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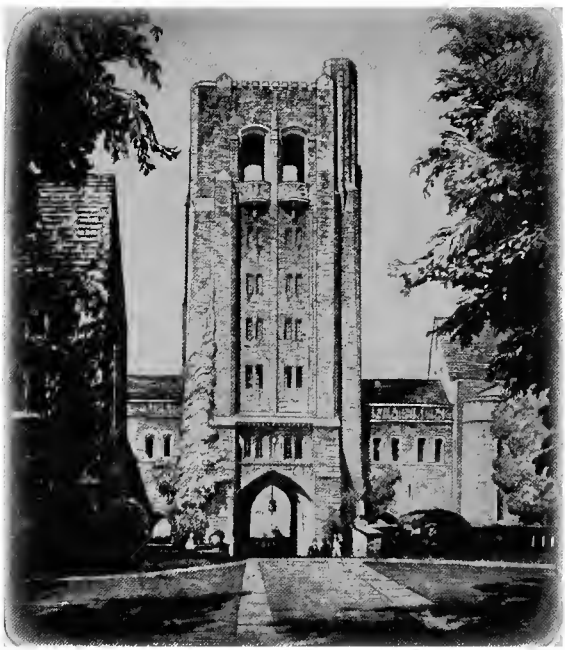

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PREFACE.

The collection of cases on the Law of Officers which is herewith offered to the public, the editor hopes will fill a gap in the course of instruction in those law schools which have adopted in principle the case method of instruction, and which desire to devote some attention to this important subject.

While complete in itself this collection is a part—a greater part it is true—of a collection on the general subject of Administrative Law. References have therefore been made in the foot notes appended to specific cases, to cases which have been set forth in extenso in the other part devoted to the "Organization of the Administrative Authorities."

As the sub-title indicates, special attention has been given to the Extraordinary Legal Remedies, which are of course the most important means through which the courts hold purely administrative officers up to their duties as set forth in the law. In those law schools in which no special course is given for the study of this subject this collection may serve the double purpose of offering a means for the study by the case method of the extraordinary remedies as well as the general law of officers. The instructor will find it profitable, however, from this point of view, to supplement the cases selected by considerable oral exposition in reference to other cases setting forth the law in its details.

The editor cannot close these prefatory remarks without acknowledging his great indebtedness to Professor Floyd R. Mechem of the University of Chicago, whose admirable treatise on Officers has been of the greatest service to him. The order adopted by Professor Mechem has in most cases been the order in which the cases selected have been arranged. The editor thinks that those who may do him the honor of choosing this collection for their class-room work will find it of the greatest value to recommend to their students the reading of Professor Mechem's work in connection with their case work. Acknowledgement is also due to Professor Ernst Freund of the University of Chicago for according to the editor the opportunity to examine a collection of cases on "Administrative Law" from which a number of cases have been selected.

FRANK J. GOODNOW.

Columbia University, May, 1906.

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THE LAW OF OFFICERS

CHAPTER I.

OFFICES AND OFFICERS.

I. WHAT IS AN OFFICE?

HALL V. WISCONSIN.

Supreme Court of the United States, October, 1880.
103 U. S. 5.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Supreme Court of Wisconsin.

The case we are called on to consider is thus disclosed in the record:

By an act of the legislature, ... approved March 3, 1857, James Hall, of the State of New York, the plaintiff in error, and Ezra Carr, and Edward Daniels, of Wisconsin, were appointed "commissioners" to make the survey. Their duties were specifically defined, and were all of a scientific character.

They were required to distribute the functions of their work by agreement among themselves, and to employ such assistants as a majority of them might deem necessary.

The governor was required "to make a written contract with each commissioner" for the performance of his allotted work, and the "compensation therefor, including the charge of each commissioner;" and it was declared that "such contract shall expressly provide that the compensation to such commissioners shall be at a certain rate per annum, to be agreed upon, and not exceeding the rate of two thousand dollars per annum, and that payment will be made only for such part of the year as such commissioner may be actually engaged in the discharge of his duty as such commissioner."

In case of a vacancy occurring in the commission, the governor was empowered to fill it, and he was authorized to "remove any member for incompetency or neglect of duty."

To carry out the provisions of the act, the sum of $6,000 per annum for six years was appropriated, "to be paid to the persons entitled to receive the same."

By an act of the legislature of April 2, 1860, Hall was made the principal of the commission, and was vested with the general supervision and control of the survey. He was required to contract with J. D. Whitney and with Charles Whittlesey for the completion within the year of their respective surveys. To carry into effect these provisions, the governor was authorized to draw such portion of the original appropriation, not drawn previous to the 29th of May, 1858, as might be necessary for the purpose; the residue to be otherwise used as directed.

By a subsequent act of March 21st, 1862, both the acts before mentioned were repealed without qualification.

On the 29th of May, 1858, Hall entered into a contract with the governor, whereby it was stipulated on his part that he should perform the duties therein mentioned touching the survey, "this contract to continue till the 3d day of March, 1863, unless the said Hall should be removed for incompetency or neglect of duty . . . . or unless a vacancy shall occur in his office by his own act or default."

On the part of the State it was stipulated "that the said Hall shall receive for his compensation and expenses, including the expense of his department of the said survey, at the rate of $2,000 per annum. . . . . *Provided,* that for such time as said Hall or his assistants shall not be engaged in the prosecution of his duties, according to the terms of said act and of this contract, deduction shall be made, *pro rata,* from the sum of his annual compensation and expenses."

Hall brought this action upon the contract. The declaration avers that immediately after the execution of the contract he entered upon the performance of the duties thereby enjoined upon him, and continued in their faithful performance until the time specified in the contract for its expiration, to wit, the 3d of March, 1863; that he was not removed by the governor for incompetency or neglect, nor was any complaint ever made by the governor against him; that he never at any time directly or indirectly, assented to the repeal of the acts of 1857 and 1860; and that thereafter he continued in the performance of his labors the same as before, and that for the year ending March 3d, 1863, he devoted his whole time and skill, without cessation, to the work.

He avers further, that for his services performed prior to March

3d, 1862, he was fully paid, but that for the year ending March 3d, 1863, he had received nothing; and that payment was demanded and refused on the 3d of December, 1863, and that the defendant is, therefore, justly indebted to him in the sum of $2,000, with interest from the date last mentioned.

He avers, finally, that on the 30th of January, 1875, he presented his claim to the legislature by a proper memorial, and that its allowance was refused.

The State demurred upon two grounds:—

1. That the complaint did not show facts sufficient to constitute a cause of action;

. . . . . .

In support of the first objection, it was insisted that the employment of the plaintiff was an office, and that the legislature had therefore the right to abolish it at pleasure. For the plaintiff, it was maintained that there was a contract, and that the repealing act impaired its obligation in violation of the contract clause of the Constitution of the United States.

The court sustained the demurrer upon the first ground, and the plaintiff declining to amend, dismissed his petition. The opinion of the court is limited to the first point, and ours will be confined to that subject. The whole case resolves itself into the issue thus raised by the parties.

No question is made as to the suability of the state. The proceeding is authorized by a local statute.

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The statute under which the governor acted was explicit, that he should "make a written contract with each of the commissioners aforesaid, expressly stipulating and setting forth the nature and extent of the services to be rendered by each, and the compensation therefor" and that "such contract" should expressly provide that the compensation of each commissioner should be at a certain rate per annum, to be agreed upon, and not to exceed $2,000 per annum for the time such commissioner may be actually engaged. The action of the governor conformed to this view. The instrument executed pursuant to the statute recites that it is an "agreement" between the governor as one party, and Hall, Carr, and Randall, the commissioners, as the other. They severally agreed to do what the statute contemplated, and he agreed to pay all that it permitted.

The names and seals of the parties were affixed to the agree-

ment, and its execution was attested by two subscribing witnesses, as in other cases of contract.

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In a sound view of the subject it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a State, for the erection, alteration or repair of public buildings, or to supply the officers or employes who occupy them with fuel, light, stationery, and other things necessary for the public service. The same reason is applicable to the countless employes in the same way, under the national government.

It would be a novel and startling doctrine to all these classes of persons that the government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of contract rights.

It is not to be supposed that the plaintiff in error would have turned his back upon like employment, actual or potential, elsewhere, and have stipulated as he did to serve the state of Wisconsin for the period named, if the idea had been present to his mind that the state had the reserved power to break the relation between them whenever it might choose to do so. Nor is there anything tending to show that those who acted in behalf of the state had any such view at that time. All the facts disclosed point to the opposite conclusion as to both parties.

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When a state descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly. *Davis* v. *Gray*, 16 Wall. 203.

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That the laws under which the governor acted, if valid, gave him the power to do all he did, is not denied. We will not, therefore, dwell upon that point. The validity of those laws is too clear to admit of doubt. It would be a waste of time to discuss the subject.

We are of the opinion that the Supreme Court of the State erred in the judgment given. It will, therefore, be reversed, and the case remanded for further proceedings in conformity with this opinion.

So ordered.

BUTLER V. PENNSYLVANIA.

Supreme Court of the United States. December, 1850.
10 How. 402.

Mr. Justice DANIEL delivered the opinion of the court.

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By the authority of a statute of Pennsylvania of the 28th of January, 1836, the plaintiffs in error were by the Governor of the State appointed to the place of canal commissioners; and by the same statute, the appointment was directed to be made annually on the first day of February, and the compensation of the commissioners regulated at four dollars per diem each. Under this law, the plaintiffs in error, in virtue of an appointment on the first of February, 1843, accepted and took upon themselves the office and duties of canal commissioners. By a subsequent statute, of the 18th of April, 1843, the appointment of canal commissioners was transferred from the Governor to the people upon election by the latter and the per diem allowance to be made to all the commissioners was by this law reduced from four to three dollars, this reduction to take effect from the passage of the act of April 18th, 1843, which as to the rest of its provisions went into operation on the second Tuesday of January following its passage, that is, on the second Tuesday of January in the year 1844. Upon a settlement of their account as canal commissioners, made before the Auditor-General of the State, the plaintiffs in error, out of money of the state then in their hands, claimed the right to retain compensation for their services at the rate of four dollars per diem, for the full term of twelve months from the date of their appointment by the governor; whilst for the state, on the other hand, it was refused to allow that rate of compensation beyond the 18th of April, 1843, the period of time at which, by the new law, the emoluments of appointment were changed. In consequence of this difference, and of the refusal of the plaintiffs in error to pay over the balance appearing against them on the account as stated by the Auditor-General, an action was instituted against them in the name of the State, in the court of Common Pleas of Dauphin County, and a judgment obtained for that balance. This judgment having been carried by writ of error before the Supreme Court, was there affirmed, and from that tribunal, as the highest in the state, this cause is brought hither for revision.

The grounds on which this court is asked to interpose between

the judgment on behalf of the state and the plaintiffs in error are these. That the appointment of these plaintiffs by the Governor of Pennsylvania, under the law of January 28th, 1836, was a positive obligation or contract on the part of the state to employ the plaintiffs for the entire period of one year, at the stipulated rate of four dollars per diem; and that the change in the tenure of office and in the rate of compensation made by the law of April 18th, 1843 (within the space of one year from the 1st of February, 1843), was a violation of this contract, and therefore an infraction of the tenth section of the first article of the Constitution of the United States. In order to determine with accuracy whether this case is within the just scope of the constitutional provision which has thus been invoked, it is proper carefully to consider the character and relative positions of the parties to this controversy, and the nature and objects of the transaction which it is sought to draw within the influence of that provision.

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. . . . The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain definite, fixed private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public shall require. The selection of officers, who are nothing more than agents for the effectuating of public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principle of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor promised, would appear to be neither reconcilable with natural justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government; or if changes would be ventured upon, the

government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a state, as constitutional ordinances must be of higher order and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power, or the extent of its exercise, may be controlled by the higher organic law or the constitution of the state, as is the case in some instances in the state constitutions, and is exemplified in the provision of the federal constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. The constitution of Pennsylvania contains no limit upon the discretion of the legislature, either in the augmentation or diminution of salaries, with the exceptions of those of Governor, and judges of the supreme court, and the presidents of the several courts of Common Pleas. The salaries of these officers cannot, under that constitution, be diminished during their continuance in office. Those of all other officers in the state are dependent upon legislative discretion. We have already shown, that the appointment to and the tenure of an office created for the public use, and the regulation of the salaries affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term *contracts*, or, in other words, the vested, private personal rights thereby intended to be protected.

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The precise question before us appears to have been one of familiar practice in the State of Pennsylvania, so familiar, indeed, and so long acquiesced in, as to render its agitation at this day somewhat a subject of surprise; . . . .

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. . . . We consider these decisions of the state court as having correctly expounded the law of the question involved in the case before us, as being concurrent with the doctrines heretofore

ruled and still approved by this court,—concurrent, too, with the decisions of the Supreme Court of Pennsylvania now under review, which decision we hereby adjudge and order to be affirmed.

. . . . . .

OLMSTEAD V. MAYOR, ETC., OF NEW YORK.

Superior Court of City of New York. June, 1877.
42 Superior Ct. Rep. 481.

This case came up on plaintiff's motion that this court direct a judgment to be entered upon a verdict rendered in favor of the plaintiff, subject to the opinion of the general term. The plaintiff sued to recover the salary alleged to be due him as landscape architect of the Department of Public Parks from May 31, 1876, to July 31, then next, inclusive.

The plaintiff was by profession a landscape architect, and had been employed many years in that capacity by the department which had fixed his salary at the rate of $6,000 per annum, and he had been paid at that rate down to and including May 31, 1876.

In the year 1876 (Laws of 1876, p. 196, ch. 193), the legislature created a board known as the "Commissioners of the State Survey," to hold office for one year, and named the plaintiff one of the commissioners.

He accepted the office of commissioner and took the oath of office May 31, 1876. He afterwards, on July 18, 1876, resigned. During the time he held the office of commissioner he, without interruption, performed the duties and rendered the services devolved upon and required of him as landscape architect. On August 4, 1876, the Department of Parks passed the resolution referred to in the opinion, whereby it was resolved, "that an allowance or payment be made to him" (the plaintiff) "for the services to the Department from May 31, 1876, at the rate of $6,000."

SPEIR, J. A preamble adopted by the department of parks on the 4th of August, 1876, is set forth in the complaint, reciting that the plaintiff had, without advice as to the effect it might have on his position as landscape architect, accepted the office of commissioner of the State survey; that some doubt had been expressed on the point, and that he had resigned the office, and had without

interruption performed the services on which he was employed, and it was resolved that an allowance and payment be made to him for the services to the department, from the 31st day of May, 1876, at the rate of $6,000.

No salary or compensation was attached to the office of commissioner of the State survey. The plaintiff took the oath of office on the 31st of May, 1876, and the board was organized.

The defense is based on the following provision of section 114 of chapter 325 of the laws of 1873: "Any person *holding office*, whether by election or appointment, who shall, during his term of office, accept, hold or retain any other civil office of honor, trust, or emolument, under the government of the United States (except commissioners for the taking of bail, or register of any court) or of the State (except the office of notary public or commissioner of deeds, or officer of the national guard), or who shall hold or accept any other office connected with the government of the city of New York, or who shall accept a seat in the legislature, shall be deemed thereby to have vacated *every office* held by him under the city government. No person shall hold two city or county *offices*, except as expressly provided in this act; nor shall any *officer* under the city government hold or retain an *office* under the county government, except when he holds such office *ex-officio* by virtue of an act of the legislature; and in such case he shall draw no salary for such *ex-officio* office."

Was the plaintiff, a landscape architect in the Department of Public Parks, an officer within the prohibition of the preceding section?

An *office* has been defined to be a right to exercise a public function or employment, and to take the fees and emoluments belonging to it. An *officer* is one who is lawfully *invested* with an office, Bacon's Abridgment, vol. 7, Title *Office* and *Officer*, p. 279, ed. of 1860; Bouv. Law. Dic. The idea of an officer clearly embraces the idea of tenure, duration, fees or emoluments, and powers, as well as that of duty. The nature of the power and the control over the officer appointed does not at all depend upon the source from which it emanates. The execution of the power, and the control over the officer, depends upon the authority of law, and not upon the agent who is to administer it. The tenure of ancient common law offices, and the rules and principles by which they are governed, have no application in this country. In England the tenure of office depends in a great measure upon ancient usage. Here there is no ancient usage which can apply to, and govern the tenure

of offices created by the constitution and laws. In such a case the tenure of the office is determined by the meaning of the statute. Every office under the constitution implies an authority to exercise some portion of the sovereign power of the State, either in making, executing or administering the laws. In the section of the statute there is no ambiguity, and there is no room for construction or interpretation. The words are clear and explicit "No person shall hold two city or county offices, except as provided in this act; nor shall any officer under the city government hold, or retain an office under the county government, except when he holds such office *ex-officio*, by virtue of an act of the legislature; and in such case he shall draw no salary for such *ex-officio* office." The distinction is plainly taken between a person acting as a servant or employe, who does not discharge independent duties, but acts by direction of others, and an officer empowered to act in the discharge of a duty, or trust, under obligations imposed by the sanctions and restraints of legal authority in official life. I can find nothing in all the sections of the charter which does not strictly limit the prohibition to persons included in the foregoing definition given by the elementary writers. The plaintiff received no certificate of appointment—took no oath for the faithful performance of duties, and exercised no powers depending directly upon the authority of law. He was simply the servant of the commissioners of the park, and responsible only to them. His responsibility was limited to them, and is in no way distinguishable from that of the carpenter and the mason who are employed to build the bridges or erect the buildings designed by the architect. The nature and dignity of the duties confided to the employes by the commissioners do not determine the character of the position. It is in no proper sense official according to any sense in which the term is used in the statute above recited.

The justices of the supreme court of Maine, 1822, gave an opinion as to whether certain duties which had been delegated by agents to be appointed by the governor, constituted the appointees officers. The case is reported in the appendix to the first edition of 3 Greenleaf App. No. 2. They say: "There is a manifest difference between an office and an employment under the government. We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office." The question was directly put before the learned judges for decision,

and they returned a sharply defined answer, wholly disconnected with the other matter, and it seems to me to be conclusive. The courts in this state are in accord with the foregoing opinion.

The plaintiff must have judgment for the amount claimed in the complaint, with costs.

BROWN V. TURNER.

Supreme Court of North Carolina. January, 1874.

70 N. C. 93.

Application for a *mandamus*, heard before Watts, J., at Chambers in the city of Raleigh, on the 20th day of January, 1874.

In his complaint the plaintiff alleges that he has been duly appointed Public Printer by his Excellency, the Governor, and asks for a *mandamus* directed to the defendant, Howerton, the Secretary of State, commanding him to deliver the public laws, etc., to the plaintiff, and also praying that he be restrained from delivering the same to the defendant, Turner. Howerton answers the complaint, raising no question of fact or law. Turner demurs to the complaint:

1st. Because of a defect of parties plaintiff, for that the Attorney General, in the name of the people of the State, should have brought the action.

2d. Because the complaint does not state facts sufficient to constitute a cause of action, in this, that the Governor of the State has no right to appoint a public printer, and that the plaintiff has never been duly appointed Public Printer or contractor.

3d. That *mandamus* is not the proper remedy for the case made by the complaint.

His Honor, at the hearing overruled the demurrer and gave judgment for the plaintiff; from which judgment defendants appealed.

BYNUM, J. To enable the plaintiff to recover he must maintain three propositions:

1. That what he claims is a public office.
2. That he has the legal title to it.
3. That he is prosecuting his claim by the right form of action.

1. Is it an office?

Ch. 43, Acts of 1869-'70, enacts "That the office of State Printer be and the same is hereby abolished, and all laws and parts of laws in conflict with this act are hereby repealed."

Ch. 180, Acts of 1871-'72, enacts "That the Joint Committee on Printing of the two Houses of the General Assembly are directed and instructed to make, execute and deliver a contract for the public printing, on the part of the State," at the rates specified in this act.

There is an act positively abolishing the office of Public Printer, *eo nomine*, which, according to *Hoke* v. *Henderson*, 4 Dev. 1, is constitutional in form and substance, because it disturbs no vested right or term of an incumbent. . . . .

. . . . . .

But it is said that an office cannot be abolished by indirection, leaving all its duties to be performed by a person called a "contractor" of public printing.

There is no magic in the word "office." When the legislature created and called it an office, it was an office, not because the peculiar duties of the place constituted it such, but because the creative will of the law-making power impressed that stamp upon it; therefore, when that stamp was effaced by the repealing act of 1869-'70, it shrank to the level of an undefined duty. The authority that invested these duties with the name and dignity of a public office, afterwards divested them of that name and dignity.

There being now no law of the land declaring it to be a public office, our next inquiry is, do the duties of the Public Printer constitute it an office?

The place is really *sui generis*, and therefore the ordinary *criteria* by which we distinguish and classify public offices cannot aid us to a conclusion here. It occupies that neutral ground where it may "shade into" a legislative or executive function, without disturbing the harmony of either. It comes within the definition of a public office because its duties relate to the public and are prescribed by public law, but so may the duties of a contractor or workman upon a public building. It seems not to be an office, because all the duties of Public Printer as prescribed by law are mechanical only, as much so as those of a carpenter or brick-mason, calling for neither judgment or discretion, in a legal sense, and which may be performed by employes, men, women and children, in or out of the State, and on his death every unfinished duty of the printer can and must be, under existing law, completed by

his personal representative. If it is an office, there is no law prescribing the term or duration of it, and it may be held for life as well as a term of years, which puts it out of harmony with the whole genius and spirit of our political institutions, a conclusion which can be forced upon us, only on the most evident necessity.

Assuming, as most favorable to the plaintiff, that this anomalous collection of duties, has vibrated upon the dividing line between two departments, a closer view will show that it has finally assumed a state of rest, upon the legislative side of the line. The office of State Printer, as such, was abolished in 1870. From that time to this, each political party, when it gained the ascendency in the legislature, claimed and exercised the exclusive control over the public printing by their own election of, or contract with, the printer. In 1873, the question was raised in a direct proceeding for that purpose, before Judge Moore, and it was then decided by him, in a well considered opinion, to be not an office, and that judgment was acquiesced in by the contestant and all the branches of the government. It would seem, then, that this action and acquiescence of all the departments of the government had fixed the true position of this place, in a manner not to be shaken. There is nothing in the nature of the duties to be performed to excite the jealousy of the other departments, or to disturb the equilibrium of either one of the three co-ordinate divisions of the supreme authority of the State. While it is true that "the executive, legislative and supreme judicial powers of the government ought to be forever separate and distinct," it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of the occupancy of what seems to be a "common because of vicinage," bordering the domains of each.

It would seem as natural for the department which enacts the laws to control the publication of its labor, as for an author to secure a copyright of his work, and to control its publication. Printing and publishing are a necessary part of the enactment of laws so essential that laws would be incomplete and valueless without being thus made known to those who are bound to observe them.

We are not, therefore, disposed to go into a more curious and critical inquiry upon this question, where no great principle is involved and where such inquiries are more calculated to confuse

than to answer any useful purpose. We hold that the legislature has the right to let out the public printing by contract.

. . . . . .

An office is based on a law, i. e., the constitution, a statute or an ordinance. See Bradford v. Justices, 33 Ga. 336. The nature of the duties is not a criterion. Thus a mere clerk may be an officer. Vaughn v. English, 8 Cal. 39. Salary or other emolument is not a criterion. State v. Stanley, 66 N. C. 59.

UNITED STATES V. GERMAINE.

Supreme Court of the United States. October, 1878.
99 U. S. 508.

Mr. Justice MILLER delivered the opinion of the court.

The defendant was appointed by the Commissioner of Pensions to act as surgeon, under the act of March 3, 1873, ...

. . . . . .

He was indicted in the District of Maine for extortion in taking fees from pensioners to which he was not entitled. The law under which he was indicted is thus set forth in sect. 12 of the act of 1825 (4 Stat. 118):—

"Every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than $500, or by imprisonment not more than one year, according to the aggravation of his offence."

The indictment being remitted into the Circuit Court, the judges of that court have certified a division of opinion upon the questions whether such appointment made defendant an officer of the United States within the meaning of the above act, and whether upon demurrer to the indictment judgment should be rendered for the United States or for defendant.

The counsel for defendant insists that art. 2, sect. 2 of the Constitution prescribing how officers of the United States shall be appointed, is decisive of the case before us. It declares that "the President shall nominate, and by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and *all* other *officers* of the United States, whose appointments are not *herein* otherwise provided for and which shall be established by law. But

the Congress may, by law, vest the appointment of such inferior officers as they may think proper, in the President alone, in the courts of law, or in the heads of departments."

The argument is that provision is here made for the appointment of *all* officers of the United States, and that defendant, not being appointed in either of the modes here mentioned, is not an *officer* though he may be an agent or employe working for the government and paid by it, as nine-tenths of the persons rendering services to the government undoubtedly are, without thereby becoming its officers.

The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument. It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish anyone not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; and this has been done where it was so intended, as in the sixteenth section of the act of 1846, concerning embezzlement, by which any officer *or agent* of the United States, *and all persons participating in the act,* are made liable. 9 Stat. 59.

As defendant here was not appointed by the President or by a court of law, it remains to inquire if the Commissioner of Pensions by whom he was appointed, is the head of a department, within the meaning of the Constitution, as is argued by the counsel for plaintiffs.

That instrument was intended to inaugurate a new system of government, and the departments to which it referred were not then in existence. The clause we have cited is to be found in the

article relating to the executive, and the word as there used has reference to the subdivision of the power of the executive into departments, for the more convenient exercise of that power. One of the definitions of the words given by Worcester is, "a part or division of the executive government, as the Department of State, or of the Treasury." Congress recognized this in the act creating these subdivisions of the executive branch by giving to each of them the name of a department. Here we have the Secretary of State, who is by law the head of the Department of State, the Departments of War, Interior, Treasury, etc. And by one of the latest of these statutes reorganizing the Attorney General's office and placing it on the basis of the others, it is called the Department of Justice. The association of the words "heads of departments" with the President and courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments. Such, also, has been the practice, for it is very well understood that the appointments of the thousands of clerks in the Departments of Treasury, Interior, and the others, are made by the heads of those departments, and not by the heads of the bureaus in those departments.

So in this same section of the Constitution it is said that the President may require the opinion in writing of the principal officer in each of the executive departments, relating to the duties of their respective offices.

The word "department," in both these instances, clearly means the same thing, and the principal officer in the one case is the equivalent of the head of department in the other.

While it has been the custom of the President to require these opinions from the Secretaries of State, the Treasury, of War, Navy, etc., and his consultation with them as members of his cabinet has been habitual, we are not aware of any instance in which such written opinion has been officially required of the head of any of the bureaus, or of any commissioner or auditor in these departments.

United States v. *Hartwell*, 6 Wall. 385, is not, as supposed, in conflict with these views. It is clearly stated and relied on in the opinion that Hartwell's appointment was approved by the Assistant Secretary of the Treasury as acting head of that department, and he was, therefore, an officer of the United States.

If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. . . . .

. . . . . .

. . . He is but an agent of the Commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

We answer that the defendant is not an officer of the United States and that judgment on the demurrer must be entered in his favor. Let it be so certified to the Circuit Court.

The wording of particular statutes has an important influence on the determination whether for the purpose of the statutes a particular position is an office or not. Compare United States v. Mouat, 124 U. S. 303 and United States v. Hendee, Ibid. 309, which hold that the same position is an office for one purpose but not for another.

II. Legislative Control of Offices.*

OVERSHINER V. THE STATE.

Supreme Court of Indiana, November, 1900.
156 Ind. 187.

Hadley, J. Appellant was convicted of practicing dentistry without a license, or certificate of registration, in violation of the provisions of the act of 1899 approved March 6, 1899 (Acts 1899, p. 479). The section involved is in these words: "Section 2. A board of examiners consisting of five reputable practicing dentists shall be appointed on or before the last Tuesday of June, 1899,

*The legislature may in the absence of constitutional restriction establish any office and may delegate its powers to establish offices to a local corporation. Blue v. Beach, 155 Ind. 121. Every office must originate in a law. United States v. Maurice, 2 Brock. (U. S.) 96.

and biennially thereafter, one by the governor, one by the state board of health, and three by the Indiana state dental association, said board to serve for the term of two years from the date of such appointment. When convened said board shall examine all applications, issue certificates thereon, and also may examine all applicants for certificates of qualification and issue such certificates to all such applicants as shall pass a satisfactory examination." Appellant assails the judgment upon the ground that the statute upon which it rests is violative of section 1, article 3; section 1, article 5; section 18, article 5, and section 3, article 6 of the state constitution and the fourteenth amendment of the federal Constitution. Appellant admits that he practiced dentistry without the license required by the statute under which he is prosecuted and that the judgment is right if that statute is constitutional.

. . . . . It is here asserted that the statute is bad for being in conflict with the various provisions of the Constitution above set out, the contention being that the appointment by the state dental association of three members of the board of examiners was void for want of authority in the legislature to confer the power of appointment on a private corporation, or individual outside the executive department.

. . . . . .

The constitution is silent upon the subject of general appointments to office. It is provided by section 1, article 5, that "the executive powers of the state shall be vested in a governor" and by section 18, article 5, "when, at any time, a vacancy shall have occurred in any other state office, [except appointment vested in the general assembly] or in the office of judge of any court, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified" and by section 1, article 15 that, "All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law."

Three things are clearly apparent from these provisions: (1) The power of appointment to some offices is committed to the general assembly; (2) the power to make temporary appointments to fill vacancies in any state office, or in the office of judge, until such officer can be regularly chosen as provided by law, and thus, to avoid a suspension of the functions of such office, is conferred upon the governor, and (3) all other officers whose appointments are not specially provided for in this constitution shall be chosen in such manner as the legislature may deem expedient. It cannot

be contended that the appointment to the office of state dental examiner is fixed by the constitution, for no such office was in existence when the constitution was adopted. The appointments to that office, therefore, come within the purview of section 1, article 15, and shall be made in such manner as may be hereafter prescribed by law. The manner prescribed by law is that the state board of dental examiners shall consist of five members, one to be appointed by the governor, one by the board of health, and three by the state dental association.

It is claimed that the statute must fail for the reason that the legislature has no constitutional warrant for bestowing the police power upon a private corporation to be by it exercised upon the citizens of the state. We perceive no reason why a corporation, such as the one complained of, may not prove itself a repository of power, as safe and salutary as an individual. The corporation is composed of practicing dentists, organized for the promotion of scientific knowledge and skill in the practice of the profession of dentistry, and which association thus stands in an intimate and well informed relation to the subject, and possessed of a peculiar interest in the successful administration of the law. It is difficult to conceive of an appointing power with higher qualifications, or likely to be swayed by more laudable motives, and that it is an organization of persons mutually interested in the enforcement and proper administration of the law surely furnishes no reason for its condemnation.

. . . . . .

In the case known as the *Slaughter House Cases,* 16 Wall. 36, the legislature of Louisiana had granted a corporation the exclusive right for twenty-five years to maintain slaughter-houses, landings for cattle, and cattle yards, within certain parishes of the state, including the city of New Orleans, requiring all animals offered for sale or slaughtered to be brought to the yards of the corporation, authorizing the corporation to charge fees, and prohibiting all other persons from maintaining such places within said territory. In holding that the legislature had constitutional authority within its police powers to confer these public duties upon the corporation, the court, by Justice Miller, uses this language. " . . . . If this statute had imposed on the city of New Orleans precisely the same duties accompanied by the same privileges, which it has on the corporation it created it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation

and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever the legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation, and to endow it with the powers necessary to effect the desired lawful purpose, seems hardly to admit of debate." See, also, *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; *Commonwealth* v. *Vrooman*, 164 Pa. St. 306, 30 Atl. 217, 25 L. R. A. 250.

For many years state officers, or officers performing state functions, have been chosen by private corporations under legislative authority, without question. Some of these are, three members of the board of trustees of Purdue University, two by the state board of agriculture, and one by the state board of horticulture (Acts 1875, p. 120, section 6176 Burns 1894); grain inspector by the board of trade or other commercial bodies of the county (Acts 1875, p. 172, 8718 Burns 1894); sextons of churches, and officers of fairs, who *ex officio* are made by law peace officers (Acts of 1881, p. 174, section 2074 Burns 1894); the state chemist by Purdue University Board (Acts 1881, p. 511, section 6618 Burns 1894); the state live stock sanitary commission by the state board of agriculture (Acts 1889, p. 380, section 2871 Burns 1894); the superintendents of schools of three of the largest cities of the state, with the governor and presidents of the higher state schools, shall constitute the board of education with power to grant state certificates of qualification to teachers. Acts 1875, p. 130, section 5849 Burns 1894.

We hold, therefore,that the General Assembly in conferring upon the state dental association power to appoint three members of the state board of dental examiners did not transcend its constitutional power, and that appointments to said board of examiners by said association are valid.

Judgment affirmed.

But the legislature may not provide a method of filling an office which is inconsistent with the provisions of the constitution. State ex rel. Worrell v. Peelle, 121 Ind. 495, *infra.*

INDIANAPOLIS BREWING COMPANY V. CLAYPOOL.

Supreme Court of Indiana. December, 1897.
149 Ind. 193.

McCABE, C. J. The legislature of 1895 passed an act approved March 1, 1895, entitled "An act to establish a department of public parks in cities having more than one hundred thousand population, according to the last preceding United States census, and a board of park commissioners, defining the powers and duties of such board and matters connected therewith, and declaring an emergency." Sections 7240-7261 Horner's R. S. 1897, (Acts 1895, p. 63). The appellant brought suit against the appellees, who are the acting members of said board, and certain other officers appointed by the circuit court at the instance of said board, under the provisions of said act, to enjoin them from further acting by virtue of any authority conferred on them by said act. The circuit court sustained a demurrer to the complaint for want of sufficient facts; and, the plaintiff refusing to plead further or amend its complaint, the court rendered judgment that the plaintiff take nothing by its suit. That ruling is called in question by the assignment of errors as the only error complained of by the appellant. The ground on which the complaint seeks an injunction is that the act is unconstitutional.

. . . . . .

But a much more serious question is presented by appellant's contention that the act violates the last clause of section two of article fifteen of our state constitution (section 224, Burns' R. S. 1894; 224, R. S. 1881), providing that "the General Assembly shall not create any office the tenure of which shall be longer than four years."

. . . . . .

The facts are disclosed in the complaint that in the spring of 1895, soon after the passage of the act in question the mayor of Indianapolis appointed five park commissioners to serve one, two, three, four, and five years, respectively, from January 1, 1895. That made the term of the one-year commissioner expire on January 1, 1896, and his successor then appointed and now in office, under the provisions of section two of the act, under a term of five years, running till January 1, 1901. The term of the two-year commissioner appointed in 1895 expired January 1, 1897, when he was reappointed as his own successor, and is now in office, the term

of which, under section two of the act, and his reappointment, is five years, expiring January 1, 1902. And the term of the five-year commissioner appointed in 1895, and now in office expires, January 1, 1900, making according to the allegations of the complaint, three of the defendants in office under a five-year term or tenure, by virtue of section two of the act. Appellees' contention that four of the members appointed in 1895 hold four-year terms, and therefore are and always had been a legal board under section six, making a majority a quorum authorized to do binding acts, is contrary to the facts alleged in the complaint, even if that fact, would constitute such majority a legal board.

It is next contended that section two is valid because the constitutional inhibition only operates to limit the terms of the several park commissioners to four years, respectively. It is tacitly conceded that, if the restriction cannot be obviated in this way, section two must fall, as a palpable violation of the constitution. This ground of upholding that part of the section other than the tenure clause is based on the familiar principle in constitutional law that a statute may be good in part, and in part void, because unconstitutional. That part fixing the term at five years, it is in effect insisted, may be declared void, and the balance of the section stand. To support this contention, counsel quote from *Clem.* v. *State,* [33 Ind. 526,] as follows: "The question is as to the application of this restriction. Does it in the case in hand render the creation of the office a void act? . . . . But we are of opinion that the restriction cannot be held to apply where, as in this case, no tenure is stated. The preceding part of the section provides, that 'when the duration of any office is not provided for by this constitution it may be declared by law; and, if not so declared, such office shall be held during the pleasure of the authority making the appointment.' This language seems to be conclusive in support of the position that an office may be created by law though its duration be not fixed, as in this case. If fixed at a longer term than four years by the act creating it, there would then be a question whether the creation of the office was not void, or whether valid, but its tenure limited to four years by force of the constitution." This is as much, if not more, against appellees' contention than for it. It not only suggests the query whether the question raised by their contention should be decided for or against them but it furnishes a basis for reasoning out the question against appellees. It is to be observed that it is not the tenure of more than four years that is prohibited, but it is the creation of an office, the

tenure of which shall be longer than four years. The forbidden act is the creation of the office of the particular description given as much as the inhibition of more than four years' tenure. It would seem, therefore, that it is the creation of the office that is void, as much, if not more, than the act of affixing a tenure of more than four years. If the language were: "No office created by the legislature shall have a longer tenure than four years," we should have a very different question to decide.

Our attention has been called to a decision of the supreme court of Kansas upon a constitutional provision precisely like our own, wherein it is claimed a different conclusion was reached by that court. *Lewis* v. *Lewelling,* 53 Kan. 201, 36 Pac. 351. The report of the case is so meagre that it is not easy to understand the reason, if there was any reason, for the conclusion indicated. The only reason assigned for the conclusion reached is the decision of the supreme court of California cited. The whole of what the supreme court of Kansas said upon that branch of the case is as follows: "The provision in section four permitting officers to be commissioned for a term of five years is violative of section two, article fifteen, forbidding the legislature to create any office the tenure of which is longer than four years. Military officers are within the provisions of the constitution. Where the statute fixes a term of office at such a length of time that it is unconstitutional the tenure thereof is not declared, and therefore the office is held during the pleasure of the appointing power. *People* v. *Perry,* 79 Cal. 105, 21 Pac. 423."

No reason is assigned by the Kansas supreme court why the constitutional inhibition forbidding the Kansas legislature to create any office of a certain tenure did not render the forbidden act void. The forbidden act there as here was the creation of the office in plain language of unmistakable meaning.

. . . . . .

As the Kansas supreme court gave no reason why such language should not be given its full force and meaning, except to cite the California case, we must assume that the reasoning in that case is the only reason on which the Kansas court reached its conclusion. But, when we examine the case, we find that it furnished no reason whatever for the Kansas decision, on account of the radical difference in the constitutional provisions of California and Kansas. The provision as it stood in both the old and new constitution of California received the consideration of the California supreme court in that case. That in the old reads as thus: "Nor shall the

duration of any office not fixed by the constitution ever exceed four years;" and in the new constitution it was: "But in no case shall such term exceed four years." This language in no way forbids the creation of the office with a tenure exceeding four years, but simply limits the tenure of all offices created by the legislature to four years. This language fully justifies the conclusions reached by the California supreme court. But it furnished no reason whatever for the decision of the Kansas supreme court, under a constitution, as ours, forbidding the creation of the office with a tenure exceeding four years. If the act was forbidden then, it was, in so far as it created the office, in violation of the constitution. It therefore appears that the Kansas decision is in plain violation of the constitution of that state, and rests on no reason whatever. Such a decision we ought not and cannot follow.

It would seem to follow that so much of sections one and two of said act as creates the office of park commissioner with a tenure of five years is in violation of the constitution, and void. All the balance of the act is inoperative, for the sole reason that there are no instrumentalities left with which to carry them into operation and effect.

It results that the defendants are doing acts affecting the plaintiff's rights that they have no authority of law to do, because there is no such office the duties of which they claim to be exercising. Hence, the complaint stated a good cause of action, and the circuit court erred in sustaining a demurrer thereto.

The judgment is reversed, with instructions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

MONKS, J., dissenting.

. . . . . .

KOCH V. MAYOR, ETC.

Court of Appeals of New York. March, 1897, 152 N. Y. 72.

VANN, J. On the 10th of May, 1895, the legislature of the state enacted that: "From and after midnight of the thirtieth day of June, 1895, the office of police justice in the city and county of New York is abolished, and all power, authority, duties and

jurisdiction then vested in the police justices in the said city and county of New York, and in the courts held by them, including the Court of Special Sessions, and in the board of police justices, and in the clerks, deputy clerks and police clerks' assistants, and in all other officers and employees of said justices or courts, or of the board of police justices, shall cease and determine." L. 1895, ch. 601, § 1.

The main question presented for decision by this appeal is, whether that section is in violation of the constitution of the state.

. . . . . .

The provision that he relies upon to nullify the legislation in question is section 22 of article VI., which is as follows: "Justices of the peace, and other local judicial officers, provided for in sections seventeen and eighteen, in office when this article takes effect, shall hold their offices until the expiration of their respective terms."

. . . . . .

I think that section twenty-two was intended to operate as a saving clause, and that it has no other effect. This left the legislature with untrammeled power to repeal the act creating the offices in question and to re-organize the local courts of criminal jurisdiction in the city of New York upon the new basis that it adopted. While we are all of one mind as to the power of the legislature to pass the act under review, we differ as to the meaning of section twenty-two of article six. The views of some members of the court upon the question have already been expressed. Others are of the opinion that the intention of the constitution was to retain the police justices in office for their respective terms until, by the lapse of time, death or otherwise, outside of legislation, their terms should expire; that, if there had been no abolition of the court, this legislation could not be sustained; that it would not have been competent for the legislature to declare that the offices of these justices should terminate and be vacant and to provide for the election of others in their places during the periods for which they were appointed; that, however, there was no intention to take away from the legislature the right of abrogating the court, and that the abrogation of the court carried with it as a necessary and inseparable incident the termination of the official life of the several incumbents of the office; that as the new court differs in its organization and jurisdiction from the old we have no power to say that the abolition of the court was a scheme to turn these men out of office, or to speculate on the reasons which induced the legisla-

ture to exercise the acknowledged power to abolish courts not established by the constitution, and that the act in question is, therefore, valid.

While we thus differ as to the method of reaching the result, we are all of the opinion that the legislation, challenged by this appeal, is not in violation of the constitution, and that the judgment should be affirmed.

All concur. *Judgment affirmed.*

The power to abolish a municipal office is possessed by the corporate authority which by law has the power to establish the office, Augusta v. Sweeney, 44 Ga. 463. An office not being a contract, Attorney General v. Jochim, 99 Mich. 358, *infra*, the legislature may shorten its term, Butler v. Pennsylvania, 10 How. U. S. 402, *supra;* increase its duties without increasing its emoluments, or diminish its emoluments during the term of an incumbent, Taft v. Adams, 3 Gray, 126; People v. Devlin, 33 N. Y. 269; State v. Douglass, 26 Wis. 428.

CHAPTER II.

THE FORMATION OF THE OFFICIAL RELATION.

I. The Law of Elections.

1. The right to vote.

KINNEEN V. WELLS.

Supreme Judicial Court of Massachusetts. May, 1888.
144 Mass. 497.

Devens, J. The case at bar is an action of tort against the registrars of voters in the city of Cambridge to recover damages for wrongfully refusing, as the plaintiff alleges, to register him as a voter for the state election of 1886. . . . . .

The case raises but a single question, although one of much importance. The defendants refused to register the plaintiff because he had been naturalized thirty days previously to his application for registration. They were fully justified in so doing, under the St. of 1885, c. 345, Sec. 7, if the provisions of this section are constitutional. This section enacts that "no person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization."

By naturalization, the plaintiff became *eo instanti* a citizen of the United States, and therefore a citizen of the . . . . state of his residence.

. . . . . .

The right or privilege of voting is a right or privilege arising under the constitution of each state, and not under the Constitution of the United States. The voter is entitled to vote in the election of officers of the United States by reason of the fact that he is a voter in the state in which he resides. He exercises this right because he is entitled to by the laws of the state where he offers to exercise it, and not because he is a citizen of the United States. *United States* v. *Anthony*, 11 Blatchf. 200. . . . . .

The qualifications of voters are fixed by State legislation. The requisitions as to ownership of property, citizenship, sex and

residence, in connection with the right of voting, vary with the constitutions or laws of the several states. However, unwise, unjust, or even tyrannical its regulations may be or seem to be in this regard, the right of each State to define the qualifications of its voters is complete and perfect, so far as it is controlled by the fifteenth article of the Amendments of the Constitution of the United States, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude."[1]

The question whether Sec. 7 of the St. of 1885, c. 345, is constitutional, must be decided by determining whether this legislation is in conformity with the constitution of this commonwealth or whether it adds anything to the qualifications which the voter is thereby required to possess, and thus interferes with the enjoyment of the rights with which this Constitution invests him.

The third article of the Amendments of the Constitution of Massachusetts, adopted in 1821, is as follows: "Every male citizen of twenty-one years of age and upwards, excepting paupers and persons under guardianship, who shall have resided within the commonwealth one year, and within the town or district, in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant-governor, senators, or representatives, and who shall have paid, by himself, or his parent, master, or guardian, any state or county tax, which shall, within two years next preceding such election, have been assessed upon him, in any town or district of this Commonwealth; and also, every citizen who shall be, in all other respects, qualified as above mentioned, shall have a right to vote in such election of governor, lieutenant-governor, senators and representatives; and no other person shall be entitled to vote in such elections."

A reading and writing qualification was established in 1857, by article 20 of the Amendments of the Constitution. But this it will not be necessary to consider in the present discussion.

The qualifications of voters are thus defined with clearness and precision; without the possession of these, the citizen or inhabitant cannot exercise the privilege of voting, and as whoever possesses them is by the Constitution entitled to this privilege, legislation cannot deprive him of it. By the Constitution, c. 1, sec. 1, art. 4,

[1] In the territories Congress determines who shall vote. Murphy v. Ramsay, 114 U. S. 15, 44.

full power and authority are given to the General Court "from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof." To the provisions of the Constitution all legislation is thus made subordinate, and it cannot add to nor diminish the qualifications of a voter which that instrument has prescribed. *Blanchard* v. *Stearns,* 5 Met. 298, 301; *Williams* v. *Whiting,* 11 Mass. 424, 433. . . . . .

. . . . . .

The plaintiff according to the allegations of his declaration possessed, when he offered himself for registration, all the qualifications of a voter required by the Constitution. Any legislation by which the exercise of his rights is postponed diminishes them, and must be unconstitutional, unless it can be defended on the ground that it is reasonable and necessary, in order that the rights of the proposed voter may be ascertained and proved, and thus the rights of others (which are to be protected as well as his own) guarded against the danger of illegal voting.

. . . . . .

The plaintiff in the case at bar does not contend that the legislature has not the right to make any reasonable, uniform, and impartial regulation of the mode of exercising the right of suffrage, and also of ascertaining the qualifications of voters. He denies that section 7 of the statute under discussion is of this character.

. . . . . .

If section 7 of the St. of 1885, c. 345, were general in terms, and allowed no person to register as a voter until he had possessed the requisite qualifications for a period of thirty days, it would be difficult to maintain its constitutionality. It would still provide for adding another qualification to those required by the Constitution, as much as if the period of domicil within the town or the Commonwealth, required by the constitution before voting, were extended to a longer period. *State* v. *Williams,* 5 Wis. 308; *Quinn* v. *State,* 35 Ind. 485.

. . . . . .

But serious as these objections would be to the constitutionality

of a general law applicable to all classes of citizens, it is not necessary now to consider them, as the section of the statute in question presents a difficulty even more serious. It undertakes to prevent a single class of citizens, namely, those who are naturalized, possessing all the qualifications established by the constitution of the Commonwealth, from exercising the right with which the constitution invests them, for a period of thirty days, by forbidding the registrars of voters to register them during that period. All citizens must stand equal before the law, and the statute, assuming them to be citizens, imposes this prohibition upon them as citizens of a specified class. A statute regulating the exercise of the right of suffrage, or the ascertainment of the qualifications of voters, must not only be reasonable in its character, but uniform and impartial in its application. If it were possible to impose a period of probation upon all qualified citizens before they were entitled to exercise the privilege, it certainly is not possible under the constitution to select a single class and impose it on this class alone.

. . . . . .

It was suggested at the argument, that the section of the statute here in question might be upheld as a reasonable regulation to protect the public from possible fraud in obtaining certificates of naturalization, and that the delay of thirty days before naturalized citizens are permitted to register allows this investigation. But the board of registrars is not competent to pass upon the question whether a certificate of naturalization was erroneously granted, nor can such a certificate be thus attacked before them collaterally. The only question upon this part of their inquiry into the qualifications of the applicant is whether he is in fact the person named in the certificate he produces, if such certificate be itself properly authenticated. It is a question of identity solely.

No argument in favor of the constitutionality of the section can be founded upon any peculiarity in the situation of naturalized citizens, which renders an inquiry in regard to their qualifications different from similar inquiries when applied to all other citizens. The regulation which it assumes to make is partial, and calculated injuriously to restrain and impede, in the exercise of its rights, the class to which it applies, in that it denies to this class, for the period of thirty days, the exercise of a right which the constitution has conferred upon it. There is no warrant for this within the just and constitutional limits of the legislative power,

which permits reasonable and uniform regulations to be made as to the time and mode of exercising the right of suffrage, and as to the ascertainment of the qualifications of voters. We must therefore pronounce section 7 of the St. of 1885, c. 345, to be unconstitutional.

. . . . . .

Where the constitution prescribes who are voters the legislature may not require the payment of taxes where that is not required by the constitution or residence in the district for a longer period than that provided in the constitution as a qualification for voting. People v. Canaday, 73 N. C. 198; St. Joseph etc., R. R. Co. v. The Buchanan County Court, 39 Mo. 485. Nor may the legislature take away any of the constitutional qualifications as by permitting women to vote where the constitution requires the male sex. Coffin v. Election Commissioners, 97 Mich. 188; In re Gage, 141 N. Y. 112.

ROGERS V. JACOBS.

Supreme Court of Kentucky. January, 1889.
88 Ky. 502.

Chief Justice LEWIS delivered the opinion of the court.

Appellant, a citizen and owner of real and personal property in the city of Louisville, instituted this action for an injunction to prevent appellees, mayor and auditor, issuing certain municipal bonds which the general council, by an ordinance passed October 20, 1888, authorized and sold for purposes therein specified, in case of approval by a majority of qualified voters of the city voting at an election that was held November 14, 1888.

As the only cause stated in the petition, or now relied on in argument, for the relief prayed for, is that the election is void for the reason it was held in the manner prescribed by an act of the General Assembly, entitled "An act to regulate municipal elections in the city of Louisville," approved February 24, 1888, the only question necessary or proper to be decided on this appeal is whether that statute is valid.

. . . . . .

It is contended that the act conflicts with three distinct provisions of the Constitution.

. . . . . .

3. Section 5, article 10, which provides that all elections shall be "free and equal."

A statute requiring votes to be given by ballot need not, any more than the mode of voting *viva voce*, operate unequally, or so as to deprive any person entitled of the privilege of suffrage, and if the one we are considering conflicts with that clause of the constitution, or denies the privilege of free suffrage, which really exists independent of that section, it is simply on account of defect or vice of some particular provision, not indispensable to the general or successful operation of the law. And the only question about which we have any difficulty is in regard to section 9, that, by requiring each voter to retire to a compartment, and there being alone and unaided, indicate by a mark on his ballot the various candidates, for numerous offices, he wishes to vote for, practically operates to deprive those unable to read or write of a free and intelligible choice, and, in fact, makes free suffrage as to them a matter of chance or accident. And thus, while the rights and interests of many may be involved, and should not be denied or jeopardized by nullifying the entire statute already in operation, if it is in other respects valid, we have no right to sanction any law, or part of a law, that takes from a single human being his constitutional rights. It is, however, permissible and often important, to limit the operation of, disregard or strike from a statute one or more provisions that conflict with the constitution, rather than allow them to vitiate the whole. And in accordance with, or at least in analogy to, that rule, section 9, must be held inoperative to the extent it, in the manner mentioned, deprives illiterate persons of the opportunity and means of freely and intelligently voting, for they have the right to avail themselves of whatever reasonable aid and information may be necessary to enable them to cast their ballots understandingly, and cannot be legally deprived of it. But as the statute is valid in other respects, the general demurrer to the petition was properly sustained, and judgment dismissing the action is affirmed.

ATTORNEY GENERAL EX REL. CONELY V. COMMON COUNCIL.

Supreme Court of Michigan. December, 1889.

78 Mich. 545.

MORSE, J. At the last session of the legislature an act was passed, entitled:

"An act to preserve the purity of elections and guard against abuses of the elective franchise, in the city of Detroit."

This act was approved by the governor July 1, 1889, upon which day it took effect, and became operative. Local Acts of 1889, p. 994.

The relator, in his petition, sets forth that the common council of the city of Detroit has neglected and failed to comply with the law, and still fails and neglects to do so, although well aware that the necessity of such compliance is reasonable and urgent; and he believes that said common council intend to ignore the act entirely, and that such body intend to hold the city election to take place in November, 1889, under the registration and election laws in force before the passage of this act, the same in every respect as if no such act had been passed. The Attorney General therefore asks that this court issue a peremptory *mandamus* to compel said common council . . . . . to provide suitable and proper means for the registration of electors.

. . . . . .

The common council of the city of Detroit, in answer to the order to show cause why the writ of *mandamus* should not issue to compel them to obey this law, says:

. . . . . .

3. That this law will also disfranchise a large number of electors, residents of Detroit, who do business outside of and away from said city, as such persons will necessarily be absent from the city during the days fixed by this act for registration.

4. That it will also disfranchise those persons who from sickness are unable to appear before the boards of registration on such days.

5. That it will disfranchise those moving from one ward to another after the last day of registration, who are electors under the constitution and general laws of the state as to qualifications of voters.

. . . . . .

That for these reasons, and for other good and substantial reasons appearing upon the face of the law, the act is inoperative, burdensome, unreasonable, unconstitutional and void.

Upon hearing and argument of this matter upon petition and answer, we, on October 11, 1889, denied the application for the writ. The reasons for so doing will now be stated.

. . . . . .

In my view the law is unreasonable and void in that it undertakes to disfranchise a large number of voters, through no fault of their own, and to make an unjust and unlawful distinction between the rights of native-born and naturalized citizens and electors. The constitution authorizes the legislature to enact laws "to preserve the purity of elections, and guard against abuses of the elective franchise;" but this does not authorize by direction or indirection, the disfranchisement, without his own fault or neglegence, of any elector under the constitution. Article 7, sec. 6.

The constitution provides that—

"In all elections, every male citizen, every male inhabitant residing in the state on the 24th day of June, 1835, every male inhabitant residing in the state on the first day of January, 1850, who has declared his intention to become a citizen of the United States, pursuant to the laws thereof, six months preceding an election, or who has resided in the state two years and six months, and declared his intention as aforesaid, and every civilized male inhabitant of Indian descent, a native of the United States, and not a member of any tribe, shall be an elector, and entitled to vote; but no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he shall be above the age of twenty-one years, and has resided in this state three months, and in the township or ward in which he offers to vote ten days next preceding such election." . . . . .

By this section of the constitution it will be noticed that there are five distinct classes of persons who are made electors, and the only qualification to any of these classes is that the elector shall be of age, and have resided in the state three months, and in the township or ward where he offers to vote ten days, next preceding the election. It cannot be for a moment contended that by section 6 of article 7 the framers of the constitution intended to give the legislature power to arbitrarily disfranchise any elector who is such under section 1 of the same article, or to make any difference between the rights of any of the classes of electors therein specified, or to put obstacles in the way to the ballot box

for one class, while the road is left open to another. The laws to regulate elections, and to preserve their purity, and to guard against abuses of the elective franchise, must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert and impede, the exercise of the right to vote. *Capen* v. *Foster*, 12 Pick. 488.

Let us examine the act before us. See Local Laws of 1889, p. 994. The plan of registration under this law is extensive and minute in its details. In this discussion we shall only concern ourselves with its general features and results. It provides that in the year 1889, and again in 1892, and every fourth year thereafter, striking by design or accident, a presidential election year, there shall be a new complete and general registration of voters in the city of Detroit. And it is made the duty of every elector to see that his name is registered in compliance with the requirements of the law, and he shall not be deemed to have acquired a legal residence in the precinct unless he has so caused himself to be registered, "nor shall any ballot be received by the inspectors at any election, *under any pretense whatever,* unless the name of the person offering such ballot shall have been entered in the register of the precinct in which he claims to vote as herein provided." Sections 3 and 4.

The elector must personally apply to the board for registration, and such board "shall examine each applicant." Persons who will be of age on election days, having the other qualifications of electors, may be entered on the register. "*Every applicant,* in the years when a general new registration is required, who has commenced to reside in such precinct, and who has resided therein at least two days," if he be otherwise qualified, shall be entered on the register, and can vote on election day, if he has resided therein ten full days next preceding. Section 7.

The meeting of these boards of registration for 1889, and for 1892, and every four years thereafter, is first to be held on the first Monday of October, at which time the board sits for four days, and also again one day, on the fourth Monday of October. The law makes no provision for any other registration in the years of this new or general registration. In this year, the fourth Monday of October came on the 28th and the city election on the 5th of November, there being seven days between the last day of registration and election day, but whenever the month of October begins on Sunday, Monday or Saturday more than ten days will ensue between the last day of registration and

the day of election, and, as the act requires that the elector must have actually resided in the precinct two days before his name can be entered on the registry book, this act, in the years of general registration, will disfranchise every voter who has not resided sixteen or more days in the precinct before election day, whenever the month of October begins on either one of these three days. For instance, in 1888, October began on Monday. The fourth Monday was the 22d. The general election day was November 6, leaving 14 full days between the last day of registration and election; and, adding the two days, every elector not residing within the precinct for 16 full days before the day of election, under this act, would have been deprived of his vote. This would be in direct conflict with the constitution, which makes him an elector upon a residence of 10 days. No such regulation as this is reasonable. There is no good reason why the boards of registration cannot sit within the ten days before election, and thereby preserve to each elector his constitutional right. Nor is this all. If the legislature can make the residence 12 or 16 days, it can make it a month, three months, one year. This, in my opinion, cannot be done indirectly, under the guise of regulation, any more than it can be done directly, as a mere exercise of the legislative will. And no one will contend that the legislature could prescribe by statute that a resident of the City of Detroit must reside in a precinct 12 days, 16 days, or a month, before his ballot could legally be taken on election day, in the face of the constitution, which provides that he need reside therein but ten days.

But more unreasonable yet is this act in that it contains no provision by which a person who is sick or absent on the days of registration can vote on election day. It may be said, with some show of reason, perhaps, that a person who is absent on the registration days is himself in fault, in not returning to his home, and complying with the regulations which the legislature have a right to prescribe; but the man who is ill and unable to attend the meetings of the board, but who is able to be out on the day of election, is deprived of his ballot, and for no good reason, that I can see. And neither do I think there is any necessity of disfranchising a large number of business men, who will be disfranchised unless they drop important business, and travel many miles to be registered, some seven or more days before election. There are, under this law, but five days in the whole year that an elector

can cause his name to be placed on the registry list; and this, unmistakably, by the provisions of the act, he must do personally.

. . . . . .

There is no state in the union that has ever sustained a law like this, except Illinois. All of the registration laws that have been upheld by the courts of other states have contained some provision by which a sick or absent voter might not necessarily be disfranchised, excepting the law of 1885 in Illinois. See *People* v. *Hoffman,* 116 Ill. 587, 5 N. E. Rep. 596 and 8 id. 788.

. . . . . .

In our own state the provision as to sick and absent voters is well known; and so far no great abuse of the elective franchise has been developed from the exercise of the privilege therein granted, of registering on election day. How. Stat. Par. 93.

The object of a registry law, or of any law to preserve the purity of the ballot-box, and to guard against the abuses of the elective franchise, is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. It is for the purpose of preventing fraudulent voting. In order to prevent fraud at the ballot-box, it is proper and legal that all needful rules and regulations be made to that end; but it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. Nor can the legislature, in attempting, ostensibly, to prevent fraud, disfranchise legal voters without their own fault or negligence. The power of the legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation not destruction. *Page* v. *Allen,* 58 Penn. St. 338; *Dells* v. *Kennedy,* 49 Wis. 555; *Edmonds* v. *Banbury,* 28 Iowa 267; *Monroe* v. *Collins,* 17 Ohio St. 665, 685; *Daggett* v. *Hudson,* 43 id. 561; *State* v. *Baker,* 38 Wis. 71; *State* v. *Butts,* 31 Kan. 554.

These authorities all tend in one direction. They hold that the legislature has a right to reasonably regulate the right of suffrage, as to the manner and time and place of voting and to provide all necessary and reasonable rules to establish and ascertain by proper proof the right to vote of any person offering his ballot, but has no power to restrain or abridge the right, or unnecessarily to impede its free exercise. This law before us disfranchises every person too ill to attend the board of registra-

tion, and unreasonably and unnecessarily requires persons whose business duties, public or private, are outside of Detroit, to return home to register as well as to vote, making two trips when only one ought to be required.

. . . . . .

Section 13, in reference to removals from one precinct to another, and the necessary steps to become registered in such cases, seems to me most unreasonable and unnecessary; but perhaps this is within the power of the legislature, as it is not absolutely impossible to comply with it.

. . . . . .

In my opinion, no registry law is valid which deprives an elector of his constitutional right to vote by any regulation with which it is impossible for him to comply. No elector can lose his right to vote, the highest exercise of the freeman's will, except by his own fault or negligence. If the legislature, under the pretext of regulation, can destroy this constitutional right by annexing an additional qualification as to the number of days such voter must reside within a precinct before he can vote therein, or any other requisite, in direct opposition to any of the constitutional requirements, then it can as well require of the elector entirely new qualifications, independent of the constitution, before the right of suffrage can be exercised. If the exigencies of the times are such, which I do not believe, that a fair and honest election cannot be held in Detroit, or in any other place in our state, without other qualifications and restrictions upon both native-born and naturalized citizens than those now found in or authorized by the constitution, then the remedy is with the people to alter such constitution by the lawful methods pointed out and permitted by that instrument. . . . . .

This law being, in the respects pointed out, both unreasonable and in conflict with the constitution, and it being apparent that the legislature would not have enacted the other portions of the act had it foreseen that the courts would declare these parts unconstitutional, the whole act must fall and be held unconstitutional and void. *Dells* v. *Kennedy*, 49 Wis. 560, and cases cited; *Daggett* v. *Hudson*, 43 Ohio St. 561; *Brooks* v. *Hydorn*, 76 Mich. 273; 42 N. W. Rep. 1122.

The other justices concurred.

MAYNARD V. BOARD OF CANVASSERS.

Supreme Court of Michigan. October, 1890.
84 Mich. 228.

CHAMPLIN, C. J. The legislature, at its biennial session of 1889, passed an act numbered 254 (3 How. Stat. 2835).

Section 1 of said act reads as follows:

"Sec. 1. The people of the State of Michigan enact, That, in all elections of representatives to the state legislature in districts where more than one is to be elected, each qualified elector may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same among the candidates as he may see fit, and the candidates highest in votes shall be declared elected.

. . . . . .

The city of Grand Rapids comprises one election district, and is entitled to elect two representatives to the state legislature. It is known as "The First Representative District." Fred A. Maynard, the relator, is an elector residing in that district, and in his petition duly verified, in which he prays for a *mandamus*, states . . . . . that the inspectors in several of the precincts counted and returned the cumulative votes for relator as single votes only; that the board of district canvassers met, and from the returns made a statement that, for said office of representative, White received 7,258 votes; Hayward 7,074 votes; Maynard, the relator, 5,374 votes; Thaw, 623 votes; and Belden, 1 vote, and determined that White and Hayward were elected; that relator had the greatest number of votes, and was duly elected representative; that he bases his claim to election upon the legality of said cumulative votes, and avers that if every ballot having his name only for representative as aforesaid, with the statement "two votes" opposite the name as aforesaid, shall be counted as two votes, then he received more than 10,000 votes for said office, and this exceeded the votes given for any other candidate. He admits that, if said votes cannot be counted for him cumulatively,—that is, if every ballot having the statement "two votes," as aforesaid, for him is legal only as one vote, and must be so counted,—then the said White and Hayward received a greater number of votes for representative at said election than the relator. He prays for a *mandamus* to compel the board of district canvassers to declare him elected, and that the chairman and clerk certify the same.

. . . . . .

There has been in the latter half of the present century a growing desire to secure to minorities a proportionate representation in legislative and corporate bodies, and from time to time schemes have been advocated by those who have desired to bring about what they claim as a reform in existing modes of election to secure to the minority a just and proportionate representation. These schemes may be reduced to four well recognized classes, viz.:

1. The "restrictive," which requires a certain number to be elected on one ticket, and prohibits any elector from voting for the whole number to be elected. Thus, if four are to be elected, no one can vote for more than two.

2. The "cumulative," which requires three or more to be elected and permits the elector to cast as many votes as there are persons to be elected, and to distribute such votes among the candidates as the elector may choose.

3. The "Geneva," "free vote" or "Gilpin" plan. By this plan the districts are required to be large, and each party puts in nomination a full ticket, and each voter casts a single ballot. The whole number of ballots having been ascertained the sum is divided by the number of places to be filled, and each ticket is entitled to the places in proportion to the number of votes cast by it, taking the persons elected from the head of the tickets. This plan doubtless comes nearest to a proportional representation of the minority of any plan devised which is practical for popular elections. It was originated by Mr. Gilpin in 1844, who advocated it in a pamphlet published in Philadelphia. It has never been adopted in this country, but has become the *liste libre* of Geneva, and is said to work well in Switzerland.

4. The "Hare" plan, or "single vote." This method is too intricate and tedious ever to be adopted for popular elections by the people. It requires successive counts and redistribution of the votes until an election is reached.

The effort to realize minority representation by the use of the restrictive method was tried in Ohio, under an act passed in that state. The law was declared unconstitutional by the supreme court. *State* v. *Constantine*, 42 Ohio St., 437. That court held that it was the right of every elector to vote for every candidate or person to fill the offices provided by law to be elected by vote of electors, and a law which said that no person could vote for more than two of the four persons to be elected took away from the elector a substantial right guaranteed to him by the constitution.

In Pennsylvania, Mr. Buckalewe for many years advocated the

adoption of the system of cumulative voting in order to secure minority representation; and, mainly through his efforts, in 1874 a provision was inserted in the constitution of Pennsylvania (article 16, section 4) permitting stockholders in corporations to vote cumulatively upon the shares of stock. It was held in *Hays* v. *Com.*, 82 Penn. St. 518, that, as to corporations existing at the time the constitutional provision was adopted, the constitutional provision could not apply, because it interfered with and affected existing vested rights.

. . . . . .

In Nebraska (article 11, section 5), ... and in California (article 12, section 12), by constitutional enactment, cumulative voting is permitted upon stock in corporations. So far as I am aware, Illinois is the only state which has tried the experiment of cumulative voting for members of the legislature. It is significant that all the states which have authorized such voting have submitted it to the people for their adoption as a part of the fundamental law. In Ohio the legislature endeavored to authorize it without a constitutional amendment, and it was declared unconstitutional.

. . . . . .

Such has been the action of other states. Is the law contrary to the constitution of this state? The provisions of the constitution bearing upon this question are those relating to elections, and those to the election of representatives.

. . . . . .

It was conceded upon the argument by counsel who appeared to defend the constitutionality of this law that, when the constitution was adopted, no such thing was thought of as cumulative voting; that it is a recent invention; and that our people, when they adopted the constitution, had no thought of investing the legislature with the right of enacting a cumulative voting law; but they contend that, no matter what has been the uniform custom, the legislature has the power to enact a cumulative voting law, or any other law that is not expressly or by plain implication forbidden them to do by the constitution.

. . . . . .

. . . . . there is in my mind no doubt that the act under consideration is unconstitutional. The constitution is the outgrowth of a desire of the people for a representative form of government. The foundation of such a system of government is, and always has been, unless the people have otherwise signified by

their constitution, that every elector entitled to cast his ballot stands upon a complete political equality with every other elector, and that the majority or plurality of votes cast for any person or measure must prevail. All free representative governments rest on this, and there is no other way in which a free government may be carried on and maintained. That the majority must rule, lies at the root of the system of a republican form of government no less than it does in a democratic. When there are more than two candidates for the same office placed in nomination, it may often happen that one candidate, although he may receive more votes than any other, may not receive a majority of the votes cast. Still the principle of majority rule is preserved, for in such case more of the electors prefer such candidate than they do any other particular candidate to represent them. It is the constitutional right of every elector, in voting for any person to represent him in the legislature, to express his will by his ballot; and such vote shall be of as much influence or weight in the result, as to any candidate voted for, as the ballot and vote of any other elector. The constitution does not contemplate, but by implication forbids, any elector to cast more than one vote for any candidate for any office. This prohibition is implied from the system of representative government provided for in that instrument.

The political history of the state from 1836 to the present time shows that every elector has an equal voice in the choice of those who shall represent the people in the legislature. It is implied in those provisions of the constitution which require that representatives in the legislature shall be chosen by ballot, and by single districts. By these provisions every elector expresses his wish by ballot, and a single vote is implied. It is implied in those provisions of the constitution that declare that every male citizen of twenty-one years of age, and possessing the qualifications prescribed, shall be entitled to vote at all elections; and that all votes shall be given by ballot, except for such township officers as may be authorized by law to be otherwise chosen.

. . . . . .

Giving to the language of the constitution its ordinary signification, it declares the principle that each elector is entitled to express his choice for representative, as well as all other officers, which is by his vote, and the manner of expressing such choice is by ballot. When he has expressed his preference in this manner, he has exhausted his privilege; and it is not in the power of the legislature to give to his preference or choice, without conflicting

with these provisions of the constitution, more than a single expression of opinion or choice. As to members of the legislature, county or township officers, the constitution nowhere in express terms prohibits the legislature from enacting a law that the certificates of election shall be issued to the person having the least number of votes. This is practically what is asked for in this case, for relator admits that he has received a minority of the votes cast, if each relator [elector] can cast but one vote for a candidate. No one would contend that a law declaring the person who received the least number of votes elected to an office would be a constitutional and valid law; and yet we cannot lay our finger on the clause prohibiting in terms such legislation.

It is true, the constitution does not prohibit the legislature by express language from concocting some scheme by which the equality of the electors in the choice of representatives may be impaired or defeated. There is nothing in the constitution which by express language prohibits the legislature from enacting a law providing that such electors as appear by the assessment roll of the preceding year to have been assessed $1,000 and upward shall have an additional vote for each $1,000 for which they are assessed and pay taxes on. This would permit every elector qualified under the constitution to vote at least once, and others to vote as many times as they were assessed $1,000 upon the assessment roll. It requires no argument to show that such legislation would defeat the object of the elective franchise, which is that every elector's franchise is of equal value to that of every other elector, and it would subvert the will of the people as expressed through the ballot. And such is the case before us. No reason can be given why, under our constitution, one elector should be permitted to vote twice or seven times for any particular person to represent him in the legislature, when any other elector, who desires to exercise the right which the constitution gives him to vote for every person allowed by law to represent him in the legislature, is permitted to vote but once. The choice of the elector, as expressed by the ballot, who "plumps" his vote under this law is equal to the choice of two electors in Grand Rapids, or to seven in Detroit, who exercise the right which the constitution gives him to vote for every candidate to be chosen. It is no answer to say that he, too, may forego the right of an elector to vote for the number of representatives which the law permits in cities entitled to more than one representative; for to do so he is compelled to relinquish a constitutional right, and his right as an elector is in this respect

abridged. What different in principle or in result is this law, which permits one elector to cast more than one vote for a candidate, from the act of a person who stuffs a ballot-box with more votes for a particular candidate than there were electors voting for him? The only difference is that in one case the will of the majority is overcome and defeated under the forms of law, and in the other without law. Both are frauds upon the rights of the majority of the electors; both alike strike down the constitutional safeguards of the people; both are subversive of a free representative government. . . . .

Any construction of the constitution which will permit an elector to vote more than once for the same person to be a representative, would destroy that uniformity of the right of every elector, wherever he may reside in this state, to cast one vote, and but one vote, for each representative for which he is entitled to vote; and as was said by Mr. Justice Campbell in the case of *Attorney General* v. *Detroit Common Council,* 58 Mich. 216:

"It cannot be lawful to create substantial or serious differences in the fundamental rights of citizens in different localities in the exercise of their voting franchise."

The law under consideration does create substantial and serious differences between the rights of the electors in Grand Rapids and in Detroit and those of other parts of the state, in the exercise of their voting franchises. In Grand Rapids it defeats the will of a majority of the electors, and, instead of securing a minority representation, it gives an equal representation with the majority. In Detroit, as stated upon the argument of the learned counsel, instead of that municipality being represented in the legislature by those electors who constituted a majority who voted for representative, and, if no elector had voted more than once for any candidate, such majority would have elected seven representatives, the minority of the electors voting have elected four out of the seven by "plumping" their votes in different parts of the city. Here the will of the majority has been defeated and overridden by votes which do not represent the will of an individual elector in each case, but which do represent, if the law is constitutional, a legal stuffing of the ballot-boxes with false votes. In this state, no matter by what means accomplished, whether because a candidate who receives a majority of the votes is ineligible, or whether an elector votes more than once for a candidate, no person is elected who receives only the vote of a minority of the electors voting. *People* v. *Molitor,* 23 Mich. 341. Although the constitution re-

quires representatives to be elected upon a general ticket in the cases specified, yet every elector is not obliged to vote for every office to be filled, or for every person on the ticket. He may vote for one or more. But he cannot vote more than once for any person, for the reason before stated. . . . .

Upon consideration of the whole record, the application must be denied.

MORSE and LONG, JJ., concurred with CHAMPLIN, C. J.

CAHILL, J., dissenting.

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Where limited or cumulative voting is permitted by the constitution for certain officers it may be provided by the legislature for others. Commonwealth v. Reeder, 171 Pa. St. 505; People v. Nelson, 133 Ill. 565.

HANNA V. YOUNG.

Court of Appeals of Maryland. June, 1896.

84 Md. 179.

ROBERTS, J., delivered the opinion of the court.

The sole object of this appeal is to test the validity of the 30th section of the Act of the General Assembly of Maryland, passed at January session, 1896, ch. 359. . . . .

The facts proper to be stated are that an election for five town commissioners was held in the town of Bel-Air, on the first Monday of May, 1896, and conducted in accordance with the provisions of its charter as amended by the act of 1896, except that judges of election, as required by section 30 of said act, did not, as a condition precedent, require of each person offering to vote at such election, to show that he was assessed with one hundred dollars' worth of real or personal property on the tax book of said town before he was entitled to vote. The said judges of election ignored this provision of the Act of 1896 and allowed all male citizens residing within the corporate limits of Bel-Air above the age of twenty-one years to vote, notwithstanding the right of a number of said citizens to vote was challenged, upon the ground that they were not assessed with the requisite amount of property. The election was accordingly conducted as if the Act of 1896 had not been passed or was void of legal effect. The result of the

election was that the five persons receiving the highest number of votes acted as if they had been duly elected; having qualified and organized, they proceeded to elect James C. Young, the petitioner in this case, treasurer of the town of Bel-Air, for the ensuing year. The petitioner and appellee here, having qualified, demanded of the appellant who had on the first Monday of May, 1895, been elected treasurer of Bel-Air, the possession of the books, papers and other property of the town then in his possession. This the appellant refused to yield and the appellee accordingly filed his petition in the court below, for the writ of *mandamus* to compel the delivery to him of said books, etc. The appellant answered said petition, denying the validity of said election and justifying his refusal to deliver said books, etc., because the judges conducting said election had failed and refused to observe and give effect to the provision of the Act of 1896, which prescribed a property qualification for said electors voting at said election. Whereupon issue was joined and the case was heard by the court below, without the aid of a jury. The court directed the writ to issue and from the order of the court this appeal is taken. . . . .

The contention here is that the 30th section of the Act of 1896 is directly in conflict with the provisions of Art. 1, sec. 1, of the constitution of the state, which reads as follows: "All elections shall be by ballot, and every male citizen of the United States, of the age of twenty-one years, or upwards, who has been a resident of the state for one year, and of the Legislative District of Baltimore City, or of the county, in which he may offer to vote, for six months next preceding the election, shall be entitled to vote, in the ward or election district, in which he resides, at all elections hereafter to be held in this state."

It is contended on the part of the appellant that this section of the constitution plainly comprehends and includes within its express terms, *all elections*, whether state or federal, county or municipal. Yet there is but one municipality mentioned in this section of the organic law, and in fact, Baltimore City is the only municipality mentioned *eo nomine* in any part of the constitution. This court in *Smith* v. *Stephan*, 66 Md. 381, Mr. Justice Bryan delivering the opinion of the court, said: "It is sufficient to say that no municipal elections, except those held in the city of Baltimore, are within the meaning or terms of the constitution." Whilst the constitution, Art. 3, sec. 48, authorizes and empowers the General Assembly to create corporations for municipal pur-

poses, it nowhere prohibits the legislature from imposing upon the qualified voters, residing within the corporate limits of a town, any reasonable restrictions it may deem proper, when seeking the exercise of the right of elective franchise in the election of its officers. In this respect the power of the legislature is unlimited. The argument advanced at the hearing in this court is to the effect that the act in question is void because the constitution has conferred the right and prescribed the qualifications of all electors in this state, the legislature is without authority to change or add to them in any manner. If the premises of this contention were correctly stated, the argument and sequence would undoubtedly be correct. But, as already observed, the constitution, Art. 3, sec. 48, only in general terms authorizes the creation of corporations for *municipal purposes,* and leaves to the legislature the enactment of such details as it may deem proper in the management of the concerns of the corporation, or which may be regarded as beneficial in the government of the same. The constitution of this state provides for the creation of certain offices, state and county, which are filled, either by election or by appointment; and we regard it as an unreasonable inference to suppose that municipal elections held within the state (outside the corporate limits of Baltimore City) can be properly termed elections under the constitution, such as state and county elections; or that the framers of the constitution ever contemplated that Art. 1, sec. 1, of that instrument was intended to apply to municipal elections, such as the one now under consideration, which is the mere creature of statutory enactment. In the creation of a new municipality, the constitution devolves upon the General Assembly the entire duty of giving vitality to and of organizing and fostering the body corporate without any other constitutional regulation than the mandate to provide for the system itself. It is therefore the mere creature of legislative sanction and the subject of statutory regulation. In the case of *State of Florida ex rel. Lamar, Attorney General* v. *Dillon,* 32 Fla. 545, it was held that the suffrage provision in the constitution of the state (which is substantially the same as Art. 1, sec. 1, in the constitution of this state), prescribing the qualifications of electors at all elections under it, does not apply to elections for municipal officers, but such elections are subject to statutory regulation; and further, that it is competent for the legislature to prescribe the qualifications of voters at the same.

It is only at elections which the constitution itself requires to be held, or which the legislature under the mandate of the consti-

tution makes provision for, that persons having the qualifications set forth in said section 1, Art. 1, are by the constitution of the state declared to be qualified electors. Nowhere in the constitution are the governments of municipalities in this state, or their officials, either clothed with power or designated as any part of our state government, but their very creation, together with all the powers and attributes which attach to their management, are lodged by the constitution with the legislative department of our state government, save in some respects the city of Baltimore.

The same question now under consideration here arose in the case of *McMahon* v. *Mayor of Savannah,* 66 Ga. 217. The suffrage clause in the constitution of the state of Georgia is almost *in totidem verbis* the same as that in the constitution of this state. The statute sought to be declared unconstitutional was assailed upon the ground that it imposed upon the electors of the city of Savannah the payment of a poll-tax as a condition essential to their qualification as voters at any municipal election. The court held the statute to be a valid exercise of legislative power; and further held, that "all legislative acts in violation of the constitution are void, and it is the duty of the judiciary so to declare. But in considering and passing upon the question of the constitutionality of the law, the rule is too well established and settled to be departed from; that it must be made to appear that the statute, before it is declared inoperative for that cause, must be 'plainly and palpably' in violation of the constitution." *Beall* v. *Beall,* 8 Ga. 210. The solemn act of the government will not be set aside by the courts in a doubtful case. "The incompatibility or repugnancy between the statute and the constitution must be 'clear and palpable.'" *Parham* v. *Justices,* 9 Ga. 341. We also refer to the cases of *Buckner* v. *Gordon,* 81 Ky. 666, and the *Mayor of Valverde* v. *Shattuck,* 19 Col. 104, as sustaining the views expressed in this opinion. The last mentioned case was a special proceeding under a statute of the state of Colorado praying for the dissolution of the town of Valverde, and its annexation to the city of Denver. In such proceeding the county court made an order requiring the mayor and trustees of the town to call an election for the purpose of determining the question of dissolution and annexation; this order required the question to be submitted to a vote of the qualified electors of said town at such election. The mayor and trustees of the town sought to vacate the order on the ground of the unconstitutionality of the statute under which it was obtained. The statute required that the question of dissolu-

tion and annexation be submitted "to a vote of such of the qualified electors of such town or city (to be annexed) as have in the year next preceding paid a property-tax therein." The suffrage clause, section 1 of Article 7 of the constitution of the state of Colorado, is substantially the same (in so far as it involves the question under consideration in this case), as that of the Maryland constitution. Mr. Justice Elliott, delivering the opinion of the court, observes, "It is manifest that some restriction must be placed upon the phrase 'all elections' as used in section 1 (of the constitution), else every person having the qualifications therein prescribed might insist upon voting at every election, private as well as public, and thus interfere with the affairs of others in which he had no interest. In our opinion, the word 'election' thus used, does not have its general or comprehensive signification, including all acts of voting, choice or selection, without limitation, but is used in a more restricted political sense, as elections of public officers."

Without extending the discussion of this question we are clearly of opinion, both upon reason and authority, that the appellee's contention is not sustained. For the reason stated, the order of the court below directing the writ of *mandamus* to issue is reversed.

Order reversed with costs.

The counting of the votes of unqualified electors will not invalidate the election unless such votes affected the result of the election. People v. Pease, 27 N. Y. 45.

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2. *Power of the Legislature to Regulate the Right to Vote.*

RANSOM V. BLACK.

Supreme Court of New Jersey. June, 1892.
54 N. J. L. 446.

REED, J. Section 63 of the new election act reads as follows: "No voter shall knowingly vote, or offer to vote, any ballot except an official ballot enclosed and sealed in an official envelope, as by this act required. Any person violating this provision shall incur a penalty of $25.00 for each and every offense, to be recovered by an action of tort before any court of competent jurisdiction by

any person who shall *bona fide* first bring suit." The defendant below voted a ballot printed at his own expense, with no endorsement upon the back, as is required upon official ballots, and therefore contravened the section just mentioned.

This is admitted by the prosecutor, but he attacks the judgment by challenging the validity of the statute prescribing the penalty.

The indictment against the act sets out a number of particulars, in which it is charged that the statute is in conflict with the state constitution.

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. . . . Nothing, however, is established more unquestionably than that the right of suffrage is not an absolute right. No such right exists, unless specifically conferred by a constitution or a statute. It is a political right and does not flow from the declaratory clauses of the Bill of Rights. 1 *Story Const.* 580, *Cooley Const. Lim.* 599.

The question then is, whether any of the features of the statute illegally obstructs the voter in exercising the right which is expressly conferred upon him.

The right conferred is the right to vote for all elective offices. As to when, where and how the voting is to take place, is left to the legislature. Without the intervention of the legislature, the privilege conferred by the constitution would be fruitless. A wide field, therefore, is left open for the exercise of legislative discretion. The days upon which elections are to be held, the hours of the day or night during which, or between which, votes shall be received, must be determined by the legislature. So, too, the places where each election is to be held, and the size of the voting precinct, and whether the size shall be measured by territory or population, must also be settled by direct or delegated legislative authority. The widest field for the exercise of legislative wisdom and discussion is in adjusting the method by which the sentiments of the voter shall be obtained and canvassed. The constitution does not even prescribe that the voting shall be done by ballot, and, in fact, long after the adoption of the present constitution, township elections were conducted otherwise.

In adopting a scheme for these purposes, it will require little thought to perceive that many considerations beside that of the voter's convenience must be regarded. The problem has been, and still is, how to gather the prevailing sentiment of the voting body so as to best conserve the purposes of popular government. The objects which have seemed the most important have been to ex-

clude unqualified persons and to shield the legal voter from the influences of coercion and corruption. The discovery of a scheme of voting which would the best secure these objects, has long been in the thoughts of statesmen and reformers. The ballot itself became the method of registering the will of the voter in Great Britain only after a long period of agitation. The advantage of a system of secret voting was stirred by the Benthamites as early as 1817. *Encl. Brit. tit. "Ballot."* In 1835 the judges of the court of King's Bench doubted whether by ballot was a legal mode of holding an election in a parish to fill a vacant curacy, under a custom that the parishioners should elect a successor to a deceased curate. *Faulker* v. *Elger,* 4 Barn. & C. 449.

The objection of the judges to the ballot was mainly that if a person voted who was afterwards ascertained to have been disqualified, there was no way of telling how he had voted.

After years of discussion the ballot was adopted in local elections in Manchester and Stafford in 1869, and was in 1872, by the passage of Mr. Foster's ballot act (55 and 56 *Vict. c.* 33), introduced in all parliamentary and municipal elections, except parliamentary elections for universities.

But the mere use of the ballot has been shown by experience to be ineffectual to prevent coercion and corruption. The factor of supreme importance calculated to bring about this result is an enforced secrecy respecting the choice of the voter. So long as the ballot can be marked for identification, or the vote of the citizen can be disclosed in any way, the voter is liable to be called to an account for his conduct. The coercionist will treat his refusal to vote a marked ballot as an adverse vote. The corruptionist will have the means of assuring himself that the vote he has purchased will be delivered. The thoughts of those interested in pure elections were turned by these considerations to the device of some scheme for voting which would secure compulsory secrecy, and, at the same time, provide for an orderly, equal and convenient exercise of the right of suffrage. The honor of first devising such a plan belongs to the government of the province of South Australia. In 1856 a constitution was adopted by that colony granting popular representation and manhood suffrage. In 1857-8 the election acts were passed, which typifies the system which has spread to two other continents under the name of the Australian Ballot System. The practical results of the introduction of this system is shown by the testimony of Sir Robert Richard Totten, who, as a member of the government of South Australia, had opposed the

introduction of the secret ballot. His testimony, however, is that rioting and disorder had disappeared. Intimidation by landlords and trades unions had alike disappeared entirely, and the very notion of coercion or improper influences had died out. *Wigmore's Australian Ballot.*

The good results of the Australian system induced the passage of the act of 1872 in England, already mentioned, which is based substantially on the South Australian method. Wherever similar election acts have been put in operation, the sentiment of the community has been generally favorable. While they do not accomplish all that is desirable in the way of extirpating corrupt practices, their effect has undoubtedly been to secure quieter elections, to greatly reduce corruption, and almost entirely destroy coercive influences.

Now, I think, this recapitulation of the purpose and results of the class of acts of which our own is a specimen, has a pertinency to the question mooted in this case, for I think any provision in such an act which is likely to bring about a result which conduces to the purity of popular elections, should receive a favorable consideration. It is, of course, true, that if the effect of any provision is to shut off a voter from the ballot box, such provision must fall before the constitutional guaranty of the right to vote.

But in measuring cases of mere inconvenience, expense or sentiment, the existence of a salutary purpose and the likelihood of the provision tending to accomplish that purpose must weigh greatly in determining the reasonableness of the statutory regulation.

With these remarks let us look to the several points made against the constitutionality of the present act.

The first ground of complaint is, that no electioneering is permitted on election day within one hundred feet of any polling place.

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The regulation is a proper one to avoid disturbance and disorder immediately about the polls.

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The second point of attack is the part of section 63 which prohibits any person from putting a mark upon the face or back of a ballot or envelope by which the ballot or envelope may afterwards be identified by any other person as the one voted by him; and section 30, which provides, that if any ballot shall have thereon any mark, sign, designation or device other than permitted by the

act, whereby the said ballot may be identified or distinguished from other ballots cast at such elections such ballot shall be absolutely void. The point made against these provisions of the act is, that the voter has no hand in the preparation of the ballot, but that a mark of irregularity may get on the ballot in its preparation which might prevent its being counted. It is, therefore, argued that a voter, through no fault of his own, may be deprived of his vote. This criticism is grounded upon a presumed fraud or neglect of duty by the persons upon whom the duty of preparing the ballots is imposed. It is, of course, entirely true, that it is possible for a vote to be rejected because of the fraud or carelessness of such person or persons. But the same remark is true under any scheme which may be devised. Votes have been suppressed, and are constantly miscounted, in making up the results of elections.

An admission of the soundness of the present criticism would destroy the entire scheme of securing a secret ballot. Secrecy is impossible without uniformity in the appearance of the tickets and envelopes. That uniformity cannot be obtained unless the preparation of the ballot is put in the hands of some specified person or persons. The guards and restrictions placed around the preparations of the ballots are of the most explicit and stringent kind.

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The law presumes that these prescriptions of duty will be performed. It never presumes a neglect of official duty. I can perceive no substance in the objection raised against this feature of the act.

The third and fourth grounds of attack upon the act may be considered together. They are directed against the provisions of section 28, providing for the nomination of candidates by petition, and of section 33, regulating the printing of official ballots.

The first of the complaints against this legislation is that the voter who is not a member of a party which cast five percent of the entire vote cast at the preceding election is subjected to hardships from which the other voters are free. To apprehend the force of this complaint, it is necessary to observe that, by the terms of section 28, any political party, which at the preceding election, polled not less than five per cent of the votes cast in the election district, may nominate and certify the names of candidates to the secretary of state (in case they are state officers), or to the county clerk if they are county officers, or to municipal clerks if

the officers are municipal. These names are printed, without further party action or expense, upon an official ballot. But voters who are members of a party which cast less than this five per cent of votes, or voters who desire to organize a new party, can only obtain an official ballot by a petition. This petition must be signed, in case of a state officer, by qualified voters in number not less than one per cent. of the votes cast at the preceding election for members of assembly; and in case of district, county, city or township office, by not less than five per cent of such vote. The numbers of signers, however, need not exceed two hundred altogether.

It is insisted that the labor of gathering signatures and putting this petition into legal shape thus entailed upon a class of voters, is an unconstitutional discrimination against it in favor of the members of the older and larger parties.

The second complaint is, that there is further discrimination in printing tickets. By directions contained in section 33, the county or municipal clerk is to provide for each election district two hundred and fifty ballots for every fifty or fraction thereof of votes cast therein by such party at the last preceding election for members of the general assembly, except in case of nominations by petition by any party that cast no votes for any candidate or candidates at the last preceding election for members of the general assembly. In such case the ballots furnished at public expense shall be equal in numbers to one-half of the total number of votes cast in the election district at such last preceding election.

It may be observed in passing, that this provision places no obstacle in the way of any party obtaining all the ballots it may wish. It only prescribes what number of said ballots shall be printed at public expense. The number of ballots printed for each party at the public expense bears relation to the number of votes of that party, so far as that number can be approximated by the result of the preceding election. When an entirely new party puts candidates in nomination, this method of calculation is of course impracticable, and the rule adopted seems reasonable. It may give to the new party more or less ballots than to some of the parties entitled to make nominations by convention.

Now, in passing upon the validity of both of these provisions, it is to be noted that they in no way impede the voter in exercising his right to vote for any particular person or persons for office. He is at liberty to vote for any person by simply erasing a name from, and writing the name of the favored person upon any official ballot. It is, therefore, apparent that the right, in the exer-

cise of which it is claimed the voter is embarrassed, is not the right to vote, but the right to form a party and vote as one of that party. By the very frame of the complaint, the existence of parties is recognized as a part of the practical machinery for conducting elections.

Now, the plan of providing official ballots, which plan is the keystone of the secret ballot system, involves necessarily some limitation upon the number of party tickets and the number of party candidates. Of all the acts which have been passed to bring about this system of voting, I am sure none can be found which does not in some way circumscribe the privilege of demanding a place upon the official ballot as a party, or as a candidate of a party. If it was left in the power of each voter, or each coterie of three voters, to adopt a party name and demand that an official ballot should be printed at public expense, and distributed to each voter at the polls, the polls would probably be littered with ballots "thick as autumnal leaves that strew the brooks in Vallombrosa." Great expense, labor and inconvenience would result, without any appreciable benefit to the voter or to society. These regulations may not be the wisest that could have been adopted, still they are regulations which do not seriously impair the right of any citizen to vote. They are intended to restrict the number of party tickets within reasonable limits, while, at the same time, permitting any body of citizens whose number is sufficient to give importance to a concerted political movement to organize as a party.

The last ground of complaint which I shall consider is the following: That a voter whose sentiments are not in accord with the principles of any party having an official ticket, is practically deprived of his vote, because he cannot vote unless he votes a ticket having upon it the name of a party of whose principles he disapproves.

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. . . . I have, upon reflection, concluded that the obstruction put in the way of the voter is sentimental rather than substantial. We must view the question in a practical aspect. . . .

Many features of the act may offend a voter of sensitive feelings and peculiar views. Some voters have sulked and refused to vote because of the compelled seclusion in preparing the ballot and like requirements. But these exceptional instances cannot create a standard of what should be regarded as an unconstitutional deprivation of the right to vote. . . . .

I am of the opinion that no legal impediment is put in the way of the voter by this requirement.

As to the other matters discussed at the argument, it is enough to say that we find no material criticism of the provisions of the statute.

The judgment must be affirmed.

But it would seem that the legislature may not in its desire to prevent the marking of ballots oblige the voter to vote merely for the candidates whose names are on the official ballot. De Walt v. Bartley, 146 Pa. St. 529; Chateau v. Jacob, 88 Mich. 170; Sanner v. Patton, 155 Ill. 553, cf. State v. McElroy, 44 La. Ann. 796.

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3. *Construction of Election Regulations.*

BOYD V. MILLS.

Supreme Court of Kansas. January, 1894.
53 Kan. 594.

ALLEN, J. This is an original proceeding instituted in this court by O. C. Boyd as plaintiff, to try the right to the office of sheriff of Barber county. The petition shows that at the election held on the 7th day of November, 1893, according to the official canvass of the votes cast, the plaintiff received 508 and the defendant 516 votes. The plaintiff alleges that many illegal votes were cast and counted for the defendant, and that the plaintiff received a majority of the legal votes.

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It is conceded that all of the ballots used in Deerhead township were of the same color, and the sole question with reference to their legality arises from the color of the paper. It is contended on behalf of the plaintiff that the statute is mandatory, and that no ballot can be counted unless it conforms strictly to the requirements of the law; that a court is not at liberty, by construction, to do away with any of its requirements. In this contention, we think the counsel for the plaintiff is in the main correct, and that the wholesome provisions of the law are neither to be disregarded nor construed away.

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That the ballots in fact used were printed and furnished by

the county clerk, and were in all respects the same as the official ballots, excepting the color of the paper, is conceded, and it is also conceded that the ballots used in the one township were uniform in color. Does this fact operate to render the election at that voting precinct a nullity? In considering the statute, we are to keep steadily in mind the evident purpose of the legislature in its enactment. It is plain that among the most prominent ends sought to be attained was that of absolute secrecy. Any mark or distinguishing feature on the ballots which would enable a person other than the voter himself to identify the ballot, and find out how the elector voted, was intended to be strictly prohibited.

The case of the *People ex rel.* v. *Board of Canvassers,* 129 N. Y. 395, is relied on. The statute of New York differs materially from our own. The law requires that "on the back of each ballot shall be printed in type known as great primer Roman condensed capitals the indorsement, 'official ballot for,' and after the word 'for' shall follow the designation of the polling place for which the ballot is prepared, the date of the election, and a *facsimile* of the signature of the county clerk; the ballot shall contain no caption or other indorsement except as in this section provided." In distributing the ballots, those printed for the republican party were transposed so that the votes indorsed with the number of the first district in certain towns were sent to the second, and those with the second to the first, and such transpositions occurred in four towns and in nine election precincts. The twenty-ninth section of the New York act provided:

"No inspector of election shall deposit in the ballot box on election day any ballot which is not properly endorsed and numbered, except in the cases provided for in section 21 of this act, nor shall any inspector of election deposit in the ballot box or permit any other person to deposit therein on election day any ballot that is torn, or that has any other distinguishing mark on the outside thereof."

It seems that separate tickets are printed there for each political party, instead of printing all the names on one ballot. In deciding the case court lays much stress on the fact that the republican ballots, being indorsed with the wrong number, had distinguishing marks by which they could be identified, and that the secrecy of the ballot was thereby destroyed, and also on the positive requirements of the law, that no ballot should be deposited unless properly indorsed and numbered. In the case of *The State* v. *McKinnon,* 8 Ore. 493, a ballot was rejected written on colored paper,

the law requiring it to be on plain white paper. We should have no hesitancy in saying that a single ballot printed on colored paper, where the official ballots printed on white paper were being used by other electors, could not be counted. In that case it would be plain that the object of the law was contravened.

We have examined the numerous cases cited by counsel for the plaintiff, and from them deduce two rules, which seem to be steadily adhered to by the courts: (1) That, under laws similar to our own, designed to preserve the secrecy of the ballot, any mark or distinguishing feature apparent on the ballot renders it void. (2) Where the law is explicit in prohibiting the counting of any ballot which does not conform to the requirements of the statutes, that the courts will enforce the law as it reads, without interposing their own judgment as to the reasonableness or unreasonableness of the requirements.

It will be observed that the law nowhere explicitly provides that a ballot printed on paper of a color other than white shall not be counted. The only clause which could be held to imply such a provision is, that "none but ballots provided in accordance with the provisions of this act shall be counted." Among the requirements of the act, which are very minute, is one that the official ballots shall be put up in separate lots, packages of 50 ballots each, with certain marks on the outside. Will it be contended that an error in counting the ballots within any package, or in marking or addressing the packages intended for any person, would vitiate the election? The departure from the law in matters which the legislature has not declared of vital importance must be substantial, in order to vitiate the ballots. This appears to be the general current of all the authorities.

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Without proceeding to review at greater length the authorities cited by counsel on both sides of the question, we conclude that the mere fact that the paper on which all the ballots used in one election district was of a color other than white, where the ballots were not only printed by the authorities designated by law, and by them furnished to the judges of election, but were furnished by the judges to the voters, and were the only ballots furnished to or used by any voter at that voting place, is not sufficient to prevent the counting of the votes. The secrecy of the ballot has been in no wise impaired; the voters themselves have manifested no disposition to disregard the law, and it may be fairly inferred that the use of the colored ballots was an honest mistake on the

part of the judges of the election. Had a part of the ballots been white and a part colored, so as to afford some grounds for identification of the votes cast by the individual voters, a different question would be presented. We reach the conclusion that the law has not been substantially infringed, because we are unable to see how the purposes of the act can have been impaired in any degree by the mistake made in using the colored ballots. By this decision we do not intend to say that any of the provisions of the law may be disregarded, or that any officer may escape liability to punishment for violating any of its provisions. . . . .

All the Justices concurring.

As to what marks will invalidate ballots as affording means of identification see monographic note in 49 American State Reports, 240.

PAGE V. KUYKENDALL.

Supreme Court of Illinois. May, 1896.

161 Ill. 319.

Mr. Justice CARTER delivered the opinion of the court.

Of the sixty-three ballots contained in the record as having been cast at the election in question for school directors all were rejected by the trial court in the contest proceeding but nine, and these nine being for the contestants, the contestants were declared elected. The appeal is prosecuted by Page alone. We are therefore to consider only whether Page or Kuykendall received the greater number of votes cast for the office in question at said election.

The thirty-one ballots containing nothing but the two names, thus, "S. Page, W. D. Rollings," and two others similar in form, were clearly insufficient to express the intention of the voter. Appellant contends that as the only office to be filled at this election was school director it was not necessary that the office should be designated on the ballot to make the intention of the voter clear. It is plain, however, that if this contention were conceded, notwithstanding the statute requires such designation, it is still wholly uncertain which of the two persons whose names are on the ballot the elector intended to vote for for the long term and which for the short term. This choice could be determined only by the voter himself as expressed by his ballot, and when the ballot wholly fails

to express the choice it is void and cannot be counted. *Chamberlain* v. *Hartley,* 25 Atl. Rep. (Pa.) 572; *Gilliland's Appeal,* 96 Pa. St. 224.

There were eleven of the rejected ballots which contained the title of the office above the names, but were equally as uncertain as those above mentioned and in the same respect. We are of opinion that the county court did not err in refusing to count these ballots.

There were, however, ten other ballots rejected by the court concerning which a more serious question arises.

. . . . . .

Counsel for appellee insist that these ten ballots also are fatally defective because the title to the office is not designated on them, and because, as they contain two names, it is impossible to ascertain the intention of the voter as to whether he intended to vote for both for the long term or not, or what his intention really was. It is plain that where there are more offices than one to be voted for, ballots making no designation of the office will be insufficient for uncertainty, and where there are two officers to be elected for different terms, ballots which do not designate the terms should be rejected. 6 Am. & Eng. Ency. of Law 345. It is, however, the general rule that the voter shall not be disfranchised or deprived of his right to vote through mere inadvertence, mistake or ignorance, if an honest intention can be ascertained from his ballot *Parker* v. *Orr,* 158 Ill. 609, and the circumstances surrounding the election may be considered in ascertaining the voter's intention or to explain imperfections in the ballots, *Behrensmeyer* v. *Kreitz,* 135 Ill. 591; *McKinnon* v. *People,* 110 id. 305. This election was only for school directors. It was ordered for that purpose alone. This is fully shown by the pleadings and the evidence, and it cannot be said, we think, that there is any uncertainty as to these ten ballots having been cast for school directors, or at least for a school director. Besides, it is apparent from the ballots themselves that there was an attempt on the part of the voter to comply with the statute and to designate the office, for, after the name of S. Page, and on the same line, are written the words, "long term." The only officers to be elected were two school directors,—one for the long or full term of three years, and one for the short term, to fill the vacancy. Had there been no other name on these ballots than that of Page, we think no doubt could arise that it was the intention of the voters casting these ballots to vote for Page for the office of school director for the full term. We think,

also, that there being no candidate to be voted for at this election for any office other than that of school directors, the attempted and partial designation of the office on these ballots as to Page was under the circumstances, a sufficient compliance with the statute requiring the title of the office to be written or printed on the ballot, and that the office to which the voter desires each candidate voted for to be elected shall be designated on the ballot. 6 Am. & Eng. Ency. of Law, 344, note 1.

It is claimed, however, that as these ten ballots also contain the name of W. D. Rollings, without any designation of the office to which the voters desired him to be elected to, other than that which followed the name of Page, the ballots should not, under the statute, be counted for either candidate. Section 58 of the statute provides: "If more persons are designated for any office than there are candidates to be elected . . . such part of the ticket shall not be counted for either of the candidates." In the case of *Blankinship* v. *Israel*, 132 Ill. 514, there was but one office and one term to be filled and two names were preceded by the words "For assessor," and this court held that the ballot should not, under the statute, be counted for either candidate. But it cannot be said here the ten ballots in dispute have more names designated for any office than there are candidates to be elected. The office is that of school director. Two candidates were to be elected,—one for the long and one for the short term. It is clear these electors intended to vote for Page for the long term, and it may be and probably was intended that the one year term should apply to Rollings, but the ballots failed to make the designation. As Rollings' case is not before us it is unnecessary to construe these ballots as to him, any further than the effect they may have upon the rights of Page. It cannot be said, in view of the form of these ballots and of the fact that two officers were to be elected, that the words "long term" had the same relation to the name of Rollings as to the name of Page, as did the title "For assessor" in *Blankinship* v. *Israel, supra,* in respect to the two names in question in that case. In the case at bar there was simply a failure to designate any office to which these electors desired Rollings to be elected, unless, by the designation of Page for the long term, it might be implied that the voter intended to vote for Rollings for the short term,—the only remaining place to be filled; and the latter view should be adopted rather than the one that he intended to vote for both for the long term,—if it were necessary, in the decision of the case, to adopt either view. A construction will

not be adopted which would deprive the elector of his vote when his ballot is equally susceptible of another construction which will give it effect. Our conclusion is that these ten ballots should have been counted for Page, and that the county court erred in rejecting them, and in declaring that Kuykendall, and not Page was entitled to the office.

. . . . . .

The judgment of the county court is reversed and the case remanded, with directions to dismiss the petition as against Page, at the cost of appellee, Kuykendall.

Reversed and remanded.

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4. *Powers of Boards of Canvassers.*

PEOPLE V. VAN CLEVE.

Supreme Court of Michigan. January, 1850.

1 Mich. 362.

By the court, MUNDY, J.

. . . . . .

The very ingenious argument of the attorney general seems to me to be based upon the supposition that the determination of the board [of canvassers] was somewhat in the nature of a judgment at law, binding and conclusive, and that it afforded the only evidence of the rights of the contestants for this office; for, from the information, it appears that Elias M. Skinner claims title thereto; and that such judgment must be based and appear to be based upon this statement as the finding of the board, as a judgment at law is rendered upon the finding of the jury. But no such conclusive effect is given by the statute to this determination of the board, nor to the statement of the board, upon which it may properly be said to be founded.

The whole scope of the statute seems to show that this statement is but *prima facie* evidence; that in every contested election you may go behind it; the county canvass may be corrected by the township canvassers; and that these may be corrected by the ballots themselves. A contested election is not to be decided by what does or does not appear in any of these statements.

. . . . . .

The provisions of the statute show that you may go behind all these proceedings—that you may go to the ballots, if not beyond them, in search of proof of the due election of either person, the one holding, or the one claiming the office. And this is as it should be. In a republican government, where the exercise of official power is but a derivative from the people, through the medium of the ballot-box, it would be a monstrous doctrine that would subject the public will and the public voice, thus expressed, to be defeated by either the ignorance or corruption of any board of canvassers.

The duties of these boards are simply ministerial: Their whole duty consists in ascertaining who are elected, and in authenticating and preserving the evidence of such election. It surely cannot be maintained that their omissions or mistakes are to have a controlling influence upon the election itself. It is true that their certificate is the authority upon which the person who receives it enters upon the office, and it is to him *prima facie* evidence of his title thereto; but it is only *prima facie* evidence.

. . . . . .

The view which I have taken of the effect of the statement of the county board, is fully sustained by the opinion of the supreme court of the state of New York, in the cases of the *People* v. *Ferguson,* 8 Cowen 102; and the *People* v. *Vail,* 20 Wendell 14.

In the case of the *People* v. *Ferguson,* it was held, notwithstanding the determination of the canvassers in favor of the defendant, that the court and jury could look even beyond the ballot boxes, and inquire whether the votes given for H. F. Yates, were not intended by the voters for Henry F. Yates. In the case of the *People* v. *Vail,* Justice Bronson, delivering the opinion of the court, said: "The decision of the canvassers was conclusive in every form in which the question could arise, except of that of a direct proceeding by *quo warranto,* to try the right. But to hold it conclusive in this proceeding, would be nothing less than saying, that the will of the electors, plainly expressed in the forms prescribed by law, may be utterly defeated by the negligence, mistake, or fraud of those who are appointed to register the results of an election."

The demurrer must be overruled, with leave for the attorney general to reply.

Demurrer overruled.

HADLEY V. THE MAYOR.

Court of Appeals of New York. September, 1865.

33 N. Y. 603.

DENIO, Ch. J. There being no conclusion of fact found by the judge, the only questions which are open for examination upon this appeal are those which arise upon the exceptions to rulings taken in the course of the trial.

The election for mayor and other officers in 1856 was held on the day appointed by law, the second Tuesday (8th day) of April, and the terms of the newly chosen officers commenced on the first Tuesday of May thereafter. (Laws, 1855, ch. 196, sections, 1, 2, 3.) The law requires the inspectors of election to file a statement and certificate, setting forth the number of votes given for each person for each respective office, with the clerk of the common council, within twenty-four hours after the completion of the canvass, and that "the common council, at its meeting thereafter, shall canvass such returns, and determine and declare the result." (Laws, 1855, ch. 86, section 11.) The officers chosen are, on or before the time when their terms commence, to take the oath of office prescribed by law. (id., section 12.) The plaintiff had given in evidence a certificate of the determination of the common council at a meeting held on the 15th April, one week after the election. This was at least *prima facie* evidence of the act of the common council. The document was given in evidence without objection, and it was not attempted to controvert the fact that the proceedings of the council set forth in it had taken place as stated. But the defendant offered to prove another canvass before the common council, at a meeting on the 6th May following. . . .

The evidence was excluded, and this is the point of the first exception. The act does not prescribe that the canvass shall be made at the first meeting of the council after the election, a word having apparently dropped out in transcribing or in printing the section. The meaning, as it stands in the statute book, is, that the canvass shall be made at some meeting of the common council after the election. It was regular and legal to perform that duty at the first meeting, and this was what was done, as stated in the certificate. Having once been legally performed, the power of the council was exhausted. The board had no right to reverse its decision by making a different determination. The court was therefore right in rejecting the evidence which was offered.

The second exception was to the decision by which the court excluded the inspector's returns. The object, I suppose, was to show that the returns elected Mr. Quackenbush and not Mr. Perry. But the law having committed to the common council the duty of canvassing the returns and determining the result of the election from them, and the council having performed that duty and made a determination, the question as to the effect of the returns was not open for a determination by the jury in an action in which the title of the officer came up collaterally. If the question had arisen upon an action in the nature of a *quo warranto* information, the evidence would have been competent. But it would be intolerable to allow a party affected by the acts of a person claiming to be an officer, to go behind the official determination to prove that such official determination arose out of mistake or fraud.

. . . . . .

. . . . . The defendants' counsel seems to have chosen to place their defense upon the allegation of title in Mr. Quackenbush to the office of mayor, and they raised no question except that which related to the evidence of his election and the validity of his acts. Having failed to sustain their position on these questions, they cannot ask to have judgment against them reversed.

All the judges concurred in affirming the judgment except PORTER, J., who did not sit, having been counsel.

LEWIS V. COMMISSIONERS.

Supreme Court of Kansas. January, 1876.

16 Kan. 102.

BREWER, J. This is an action of mandamus, to compel a correct canvass of the votes cast in the county of Marshall for the office of county clerk. Upon the canvass that was made the canvassers rejected the returns from Waterville township, and declared one J. G. McIntire elected. If those returns had been counted, the plaintiff would have received a majority, and been declared elected. Three questions are presented: First, will the court, after a canvassing board has made one canvass, declared the result, and adjourned, compel it, by mandamus, to reassemble and make a correct canvass on the ground that at the prior canvass it had improperly omitted to canvass all the returns? Second, if the

returns are regular in form, and genuine, may the canvassing board reject and refuse to canvass them on the ground that during the election fraudulent votes were received, and other irregularities practiced by the judges and clerks of the election? And third, will the fact that, after the pollbooks and tallysheets have been properly prepared and signed, and before their delivery to the township trustee and county clerk, they are tampered with and changed by outside parties, so far as respects the votes for candidate for a single office, justify the canvassing board in rejecting the entire returns, and in refusing to count the votes cast for candidates for the other offices?

The first question must be answered in the affirmative, and the other two in the negative.

. . . . . .

It is the duty of the canvassers to canvass all the returns, and they as truly fail to discharge this duty by canvassing only a part, and refusing to canvass the others, as by refusing to canvass any. And it is settled by abundant authority, that where the board refuses to canvass any of the votes it may be compelled so to do by *mandamus*, and this though the board has adjourned *sine die*. *Hagerty* v. *Arnold*, 13 Kan. 367, is a case in point. The canvass is a ministerial act, and part performance is no more a discharge of the duty enjoined than no performance. And a candidate has as much right to insist upon a canvass of all the returns, as he has of any part, and may be prejudiced as much by a partial as by a total failure. The adjournment of the board does not deprive the court of the power to compel it to act, any more than the adjournment of a term of the district court would prevent this court from compelling by *mandamus* the signing of a bill of exceptions by the judge of that court, which has been tendered to him before the adjournment. As a general rule, when a duty is at the proper time asked to be done, and improperly refused to be done, the right to compel it to be done is fixed, and is not destroyed by the lapse of time within which in the first place the duty ought to have been done.

As to the other two questions, it is a common error for a canvassing board to overestimate its powers. Whenever it is suggested that illegal votes have been received, or that there were other fraudulent conduct and practices at the election, it is apt to imagine that it is its duty to inquire into those alleged frauds, and decide upon the legality of the votes. But this is a mistake. Its duty is almost wholly ministerial. It is to take the returns as made to

them from the different voting precincts, add them up, and declare the result. Questions of illegal voting and fraudulent practices, are to be passed upon by another tribunal. The canvassers are to be satisfied of the genuineness of the returns, that is, that the paper presented to them are not forged and spurious; that they are returns, and are signed by the proper officers; but when so satisfied, they may not reject any returns because of the informalities in them, or because of illegal and fraudulent practices in the election. The simple duty and the purpose of the canvassing board is to ascertain and declare the apparent result of the voting. All other questions are to be tried before the court for contesting elections, or in *quo warranto* proceedings. It must be borne in mind that the change in the returns in this case was made after their execution by the proper officers, and before they reached the county clerk's desk, was made by unauthorized and outside parties, and not by the election officers, and did not affect the number of votes cast and returned for this plaintiff, or his opponent. Under those circumstances, we think the commissioners were not justified in refusing to canvass the returns from Waterville township, so far at least as respects the officers other than the one concerning which the tampering with and changing of the votes was had.

The peremptory writ must be awarded as prayed for.

All the justices concurring.

But mandamus will not issue to a state board of canvassers if the Governor is a member of it. Dennett petitioner, 32 Me. 508, cf. People v. Morton, 156 N. Y. 136.

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5. *What Constitutes an Election.*[1]

PEOPLE EX REL. FURMAN V. CLUTE.

Court of Appeals of New York. December, 1872.
50 N. Y. 451.

FOLGER, J.

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The second question to be considered is whether Furman, the relator, was, at the general election of 1871, duly elected to the

[1]An election to have any legal effect must be a regular one held by the proper officers in accordance with the law. State v. Taylor, 108 N. C. 196, *infra*.

office. Neither a majority nor a plurality of all the ballots found in the boxes were for him. He had but a minority of them.

It is the theory and general practice of our government that the candidate who has but a minority of the legal votes cast does not become a duly elected officer. But it is also the theory and practice of our government, that a minority of the whole body of qualified voters may elect to an office, when a majority of that body refuse or decline to vote for anyone for that office. Those of them who are absent from the polls, in theory and practical result, are assumed to assent to the action of those who go on to the polls; and those who go to the polls and who do not vote for any candidate for office, are bound by the result of the action of those who do; and those who go to the polls and who vote for a person for office, if for any valid reason their votes are as if no votes, they are also bound by the result of the action of those whose votes are valid and of effect. As if, in voting for an office to which one only can be elected, two are voted for, and their names appear together on the ballot, the ballot so far is lost. The votes are as if for a dead man or for no man. They are thrown away; and those who cast them are to be held as intending to throw them away, and not to vote for any person capable of the office. And then he who receives the highest number of earnest valid ballots, is the one chosen to the office.

We may go a step further. They who, knowing a person is ineligible to office by reason of any disqualification, persistently give their ballots for him, do throw away their votes, and are to be held as meaning not to vote for anyone for that office. But when shall it be said that an elector so knows of a disqualification rendering ineligible the person, and knowing, persistently casts for him his ballot? There may be notice of the disqualifying fact, and of the legal effect of it, given so directly to the voter, as that he shall be charged with actual knowledge of disqualification.

There may be a disqualifying fact so patent or notorious, as that knowledge in the elector of the ineligibility may be presumed as a matter of law. In modern times Lord Denman, C. J., thus puts a case: "No one can doubt that if an elector would nominate and vote only for a woman to fill the office of mayor, or burgess in parliament, his vote would be thrown away; there the fact would be notorious, and every man would be presumed to know the law upon that fact." *Gosling* v. *Veley*, 7 Ad. & Ell., N. R. 406-439; 53 Eng. Com. Law, 406. And then referring doubtless to the *viva voce* manner of voting in England, and to the manner of keeping

polling books there, and to the fact of the number of electors there being small, so that for whom each elector has voted is known, and he may be safely allowed to recall his vote for an ineligible person, and give it for another eligible, the learned judge continues: "But in no such case are the electors who vote for him deprived of their vote if the fact becomes known and is declared while an election is still incomplete. They may instantly proceed to another nomination and vote for another candidate. If it be disclosed afterward, the party elected may be ousted and the election declared void; but the candidate in the minority will not be deemed *ipso facto* elected. But where an elector, after voting, receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchises."

To which we add, that not only must the fact which disqualifies be known, but also the rule or enactment of the law which makes the fact thus effectual.

In the multitude of cases in which the question has arisen, we think that up to this point, there is no essential difference of result. All agree that there must be prior notice to, or knowledge in the elector of fact and law, to make his vote so ineffectual as that it is thrown away. But some say that if there be a public law, declaratory that the existence of a certain fact creates ineligibility in the candidate, the elector having notice of the fact is conclusively presumed in law to have knowledge of the legal rule, and to be deemed to have voted in persistent disregard of it. Others deny that the maxim "*Ignorantia juris excusat neminem*" (even with the clause of it, "*quod quisque scire tenetur,*" not often quoted, and of which we are reminded by the very thorough brief of the learned counsel for the relator), can be carried on to that length, and insist that there does not apply in this question the rule that all citizens must be held to know the general laws of the land, and the special law affecting their own locality.

That maxim, in its proper application, goes to the length of denying to the offender against the criminal law a justification in his ignorance thereof; or to one liable for a breach of contract, or for a civil tort, the excuse that he did not know of the rule which fixes his liability. It finds its proper application when it says to the elector, who, ignorant of the law which disqualifies, has voted for a candidate ineligible, your ignorance will not excuse you and save your vote; the law must stand, and your vote in conflict with it must be lost to you. But it does not have a proper

application when it is carried further, and charges upon the elector such a presumption of knowledge of fact and of law as finds him full of intent to vote in the face of knowledge, and to so persist, in casting his vote for one for whom he knows that it cannot be counted, as to manifest a purpose to waste it. The maxim itself concedes that there may be a lack of actual knowledge of the law. But it is *ignorance* of it which shall not excuse. Then the knowledge of the law to which each one is held is a theoretical knowledge; and the doctrine urged upon us would carry a theoretical knowledge of the statute further than the statute goes itself. The statute but makes ineffectual to elect the votes given for one disqualified. The doctrine would make knowledge not actual, of that statute thus limited, waste the votes of the majority, and bring about the choice to office by the votes of a minority. We are not cited to nor do we find any decision to that extent of any court in this State. The industrious research of the learned counsel of the relator has found some from courts in other sister states. *Gulick* v. *New*, 14 Ind. 97, is to that effect. *Carson* v. *McPhetridge*, 15 id., 331, follows the last cited case. *Hatchtson* v. *Tilden*, 4 Har. & McH., 279, was a case at Nisi Prius, and is to that effect. With respect for those authorities, we are obliged to say that they are not sustained by reasoning which draws with it our judgment. *Commonwealth* v. *Read*, 2 Ashmead 261, is also cited. But that was a case of a board of twenty, assembling in a room to elect a county treasurer. On motion being made to elect *viva voce*, a protest was made that the law under which they were acting prescribed a vote by ballot. Thus *actual notice* of the law and fact was brought to each elector before voting. Nineteen persisted in voting *viva voce*. These were held to be wasted votes. One voted by ballot; and his vote was held to prevail, and the person he voted for to be elected. *Commonwealth* v. *Cluley*, 56 Penn. St. 270, is also cited. But the language of the court there is: "The votes cast at an election for a person who is disqualified from holding an office are not nullities. They cannot be rejected by the inspectors, or thrown out of the count by the return judges. The disqualified person is a person still, and every vote thrown for him is formal." And that was the case of one who was ineligible by reason of having held the office of sheriff of a county, and became a candidate in the same county for the same office before the lapse of time prescribed by the constitution; and a case in facts quite like this in hand.

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And there are American authorities which hold that if a majority of those voting by mistake of law or fact happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him in poll shall receive the office. *Saunders* v. *Haynes,* 13 Cal. 145; *State* v. *Giles,* 1 Chand. (Wis.) 112; *State* v. *Smith,* 14 Wis. 497. And in Dillon on Mun. Corp., p. 176, section 135, it is stated that unless the votes for an ineligible person are expressly declared to be void, the effect of such person receiving a majority of the votes cast is, according to the weight of American authority and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be had, and not to give the office to the qualified person having the next highest number of votes. And this view is sustained by a preponderance of the authorities cited by the author of the foot-note, some of which are cited above. . . . . .

We think that the rule is this: The existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a wilfullness in acting, when the action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both law and fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied.

To state a truism; our theory of government by the people is upon the assumption that the people as a whole, are intelligent of their rights and interests, and are honestly and earnestly concerned in the due and wise administration of affairs, and zealously alive to the need of good and fitting men in the various places of public trust, and hold in high esteem the privilege of suffrage, and are unready to pretermit its exercise or to exercise it meaninglessly. It is much to presume, with this as our starting point, that any considerable body of electors will purposely so exercise their right of electing to office as that it shall be but an empty form; and that going through with outward signs of an election they will of intent so cast their ballots, as that they will be votes wasted.

Now the finding in this case is, that there was no proof of actual

notice of Clute's ineligibility, nor of any facts from which notice could be implied, save that he was a supervisor.

There was but this fact, and the law upon the statute book; sufficient in themselves, as we hold, to render him ineligible.

But therefrom to give the office to the relator, it is first to be presumed, as a matter of law, that near 300 of those who voted for Clute had knowledge of the fact that he was supervisor; had knowledge of the existence of the act of 1853; and knew that the fact and the law, concurring thus, he was ineligible to receive and avail himself of their votes in his favor, and knew that their votes given to him were wasted, without effect upon the count.

It is to be presumed further, that knowing this, they all, though seemingly desirous of taking an effectual participation in the choice of a person to the office of superintendent, deliberately so acted as that they are assumed to have persisted against knowledge; determined to "do nothing but tender their votes for him."

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All concur.

Judgment accordingly.

See also Maynard v. Board, 84 Mich. 228 *supra.*

The rule is not clear as to whether in the absence of a law to that effect a plurality will elect. State v. Fagan, 42 Conn. 32. But McCrary in his *Law of Elections*, 2nd ed. § 197, considers that a plurality is always sufficient where a majority is not expressly required and a statute providing the plurality rule is constitutional. In re The Plurality Elections, 15 R. I. 617.

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6. Nominations to Office.

STEPHENSON V. BOARD OF ELECTION COMMISSIONERS.

Supreme Court of Michigan. October, 1898.

118 Mich. 396.

HOOKER, J. The relator asks a *mandamus* to compel the several boards of election commissioners of the twelfth congressional district to place the name of the relator upon the Republican tickets throughout the district as candidate for Congress, to the exclusion of the name of Charles D. Shelden, each claiming to be the nominee of the regularly called convention of the Republican party. The record shows that a congressional convention was

called, and the delegates assembled. It is admitted to have been a regularly called convention, and therefore its nominee, if ascertainable, is lawfully entitled to have his name printed upon the ticket.

. . . . . .

Nothing is more certain than that, when this assembly met, it constituted what the law calls "a regularly called convention"; and had there been no split, the right of the nominee to the place upon the ticket could not have been successfully questioned on the ground that it was organized upon the motion of Mr. Hambitzer, instead of under the leadership of Newett. But it did split; and we must do one of two things, viz.: Either follow the precedents, and say that we will not decide between the rival factions, or ourselves decide who were the lawfully elected delegates to the convention. To do this, we might be called upon to investigate every ward or township caucus and county convention held in the two disputed counties, and, had either side asked it, throughout the district. We have intimated that the assembly is the judge of the qualification of its members, and that back of its decisions we cannot go. Its presiding officer is its creature, and it must protect itself. In turn, its voters must protect themselves against fraud upon their convention or misconduct of its delegates, officers and candidates; and when a considerable faction of a convention leaves the meeting, and nominates a ticket, claiming to be the representative of the party which called the convention, it is not the province of the courts to determine upon technical grounds that is not, and that its action is void, and deny it a place upon the ballot, thereby defeating the purification of methods within the party, or to say which faction was right and which wrong. It is a right of the voter to repudiate wrong and corruption and fraud, if it exists, and to prevent, or unearth and defeat, corruption, and he should not be hampered by technical rules. If in this case this convention was unable to conclude its business in harmony, and the delegates divided and made two nominations, they should not be denied the privilege of going to the polls with both. Each nominee is here contending that he represents the only pure republicanism of the district, and is the lawful nominee of the true party. The electors must decide between them. In such case we know of no way of determining which of these names ought of right go upon the Republican ticket. If it were left to the voters, there would doubtless be an honest difference of opinion upon the merits of

the question. The same may be true of the boards. They may not know what they should do, and we cannot tell them further than to say that, under the admitted facts and the precedents, both are entitled to places upon the ballot.

It has been held in this state that, where rival factions of a regularly called convention of a party nominate and certify different tickets, the election commissioners have no authority to accept one, to the exclusion of the other; and it was held further, that, under such circumstances, both tickets should be printed upon the ballots; and it was said in that connection that the name of the party as certified should be placed above the ticket, without further addition or distinctive designation than such as was contained in the certificates furnished. See *Shields* v. *Jacob,* 88 Mich. 164 (13 L. R. A. 760). That case arose under Act No. 190, Pub. Acts 1891, which provided for what is ordinarily called an "Australian ballot" requiring the adoption of a vignette by each party, under which the party ticket was required to be printed.

A similar question arose in Colorado the next year, under a law of like character, which provided that the officer with whom the certificate was filed should pass upon objections seasonably filed. . . . *People* v. *District Court,* 18 Col. 26.

Phelps v. *Piper,* 48 Neb. 724 (33 L. R. A. 53), was a case where different conventions, called by different committees, but both claiming to represent one and the same party, held conventions at different times and places; and the question of the right of one ticket to a place on the ballot came before the court of last resort. It was held that both tickets were entitled to places upon the ballot. . . .

The case of *State* v. *Johnson,* 18 Mont. 556, arose under a similar statute, and bears a striking resemblance to the present case. . . .

It is observable that all the cases cited deny the authority of the officer or court to determine that the candidate of one or the other of two factions of a party is regularly nominated, and entitled to a place upon the ballot, where the statute has not expressly or by necessary implication conferred the power. Several of these question the expediency of committing such power to either, and some doubt the power of the legislature to pass such a law. There are several decisions in the State of New York, which hold that the courts have authority to pass upon such questions, and determine, between factions of a party, the right

to a place upon the ticket. These decisions are not adjudications by the court of last resort, however, and they arise under a statute expressly conferring the power. In the year 1897 a case was decided by the court of appeals (*In re Fairchild,* 151 N. Y. 359), where it was held that the action of party authorities—*i. e.,* conventions and committees—should be recognized as of controlling importance. We do not understand from what we are able to gather from the case that it was held that such decision was final or binding upon the court, but that it was proper to follow the determination of the party authorities; but, be that as it may, the important fact that the statute of New York expressly gives the courts jurisdiction in such cases does appear.

The constitutionality of such laws does not seem to be questioned in the New York case. The case is interesting if not important, for its bearing upon the claim made here that the state convention determined between the rival factions in this case. But we are not disposed to follow it, in the absence of a statute requiring the courts to settle these questions. See, also, *In re Redmond,* (Sup.) 25 N. Y. Supp. 381, and *In re Pollard,* Id. 385.

As illustrative of the kind of difficulties which arise when the legislature imposes these duties upon the courts, one of the New York cases may be cited, viz., *In re Woodworth,* 16 N. Y., Supp. 147. That was not the first time that the matter there litigated was before the courts, as will be seen later. It was a proceeding under a statute to compel a county clerk to print the names of certain parties claiming to be regularly nominated candidates of the Republican party of the county, and its determination involved an adjudication between rival factions (each claiming to be the regular organization) of the regularity of their respective nominations.

. . . . . .

Objections were filed to the certificates, and passed upon by the county clerk, and then presented to the court, *as the law provided.* The court said that the certificates were regular, and that it was therefore necessary to go into extrinsic facts. These disclosed that the county convention split, and, as there were contesting delegations from four towns, which sent delegates enough to control the convention (in view of the fact that the undisputed delegates were evenly divided), it was only possible to determine which faction had a majority by ascertaining which of the contesting delegations were entitled to seats. This the court proceeded to do by investigating the proceedings at the caucuses.

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In short, the court assumed to determine who were the lawful delegates, and held that the faction having the largest number of such delegates was entitled to a place upon the ticket, irrespective of the regularity or irregularity of the organization or action of the convention, upon the assumption, we suppose, that it was a deliberative body only in name, whose delegates would blindly vote for the candidates favored, without deliberate consideration of merits.

But the case did not end here. It came again before the same court, and we quote from the opinion:

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"When this controversy first required a judicial determination, it became necessary to decide it upon such facts as were established by affidavits, unaided by the action of any convention of the party; and, as those facts were thus made to appear, I had no difficulty in reaching the conclusion before mentioned. I am still satisfied that such conclusion was justified, and should now adopt it without hesitation, were it not for the fact that a different one has been so uniformly reached by the party conventions. In determining a question similar to this which arose in Monroe county (*In re Redmond*, 25 N. Y. Supp. 381), where the question of regularity had been passed upon by the state convention of the Democratic party, I have just held that the action of that body must be regarded as conclusive; and I see no reason why the same rule should not obtain in this case. The only difference is that here the state organization did not pass upon the question until after it had been determined judicially; but, nevertheless, both factions submitted their claims to that body and, for the reason stated in the opinion in the *Redmond case*, I think the defeated party must now acquiesce in its decision.

. . . . . .

"I still think, as already stated, that the title to regularity of the Patterson faction was pretty clearly established upon the original hearing, and that it would in view of the provision of the statute which authorizes this proceeding, have been no more than courteous for the party convention to have adopted the decision of the general term, which was deliberately made, and after a careful and impartial hearing; but there is no way in which they can be compelled to do so, and consequently it seems to me that the only rule for courts and judges to adopt in this and all similar contests is that they will interfere only in cases where there has been no adjudication of the question of regularity by some

division of the party which is conceded to be superior in point of authority to the one in which the contention arose, provided, of course, that the question of good faith in the making of such adjudication is not involved. The adoption of a different rule would inevitably tend to bring party organizations and the courts into unseemly conflicts over questions which are peculiarly within the cognizance of the former tribunals,—a result which most certainly ought, if possible, to be avoided." *In re Pollard,* 25 N. Y. Supp. 385.

Thus, it will be seen that Mongin and politics triumphed over the judicially determined rights of Patterson. A more humiliating and unseemly chapter is not to be found in the history of jurisprudence in this country, and it is all due to the misguided attempt to impose upon the court the duty of presiding over political conventions and caucuses through the medium of actions or proceedings at law, unfitted for the purpose. In the *Case of Fairchild,* 151 N. Y. 359, the matter was not disposed of until after the election, and therefore, when heard and decided, involved only a question of costs.

In the case before us, had issue been joined, and the case sent down for trial of the facts, it is not improbable that it would still be dragging along when the term of office for which the parties are candidates shall have expired.

We have seen that this court held in the *Shields Case* that the tickets of both factions were entitled to places upon the ballot. The same is true in this case, unless we find a change in the law forbidding it, and requiring us to determine which ticket is entitled to the place.

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It may be said that under the law of 1895 (Act No. 17, Pub. Acts 1895, Section 10), providing that "it shall be unlawful for said board of election commissioners to cause to be printed in more than one column on the ballot the name of any candidate who shall have received the nomination by two or more parties or political organizations for the same office" one or the other of the nominees will be at the disadvantage of having his name appear in a column by itself, as in the *Todd Case. Todd* v. *Kalamazoo Co. Election Com'rs,* 104 Mich. 485 (29 L. R. A. 330). We think, however, that the public good requires the private inconvenience; and we cannot hold, in the absence of a statute requiring it, that the nominees may stickle for a comparatively unimportant right, to the general public inconvenience to result

from his pursuit of an unauthorized remedy of doubtful efficacy and expediency. It may be asked which of these nominees should be subjected to this disadvantage. Manifestly, we have no means of determining this question, nor can we lay down a rule for such a case as this further than to say that their names shall appear in adjoining columns.

It is therefore ordered that the several respondents give to the names of the nominees adjoining columns, said respondents themselves determining which shall be placed upon the general ticket of the Republican party, the other to be in a separate column under the party name and vignette; the full ticket to be placed first upon the ballot. No costs will be allowed.

The other justices concurred.

In those states where under the law the courts exercise a control over the nominations of political parties it is held that conventions must be regularly called. State v. Tooker, 18 Mon. 540, must represent all the members of the party, State v. Weir, 5 Wash. 82, must be fairly conducted, Matter of County Clerk, 21 Misc. Rep. (N. Y.) 543, and must meet at the place fixed by the rules of the party, Liggett v. Bates, 24 Col. 314. A nomination once made cannot be revoked after the adjournment of the convention, People v. Police Commissioners, 10 Misc. Rep. (N. Y.) 98.

PEOPLE EX REL. COFFEY V. DEMOCRATIC COMMITTEE.

Court of Appeals of New York. October, 1900.

164 N. Y. 335.

Appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 5, 1900, reversing an order of Special Term granting a peremptory writ of *mandamus* requiring the defendant to place the name of the relator upon its membership and to restore him to the rights and privileges pertaining to membership in the Democratic general committee of Kings county.

At a primary election held in September, 1899, the relator was duly elected a member of the Democratic general committee of Kings county and afterwards duly qualified by paying the prescribed dues. At a meeting of such committee held March 23, 1900, he was, by resolution, expelled for alleged disloyalty and open hostility to the Democratic party, and has since been barred

from exercising the rights and privileges pertaining to his office as member of such committee.

PARKER, Ch. J. The fundamental question in this case is whether a member of the general committee of a county may be removed from office as a member of the committee. The answer to it depends upon the construction now to be given to the primary election law (Chapter 473 of the Laws of 1899, vol. II), section first of which, in declaring the application of the act, says: "It shall be controlling: (1) on the methods of enrolling voters. . . . . ; (2) on primary elections . . . . . ; (3) on party conventions . . . . . ; (4) on the choice . . . of political committees and on the conduct of political committees in and for any political subdivision of the state. . . ."

It will help us intelligently to consider the statute if we call to mind the preceding legislation intended to protect the rights of minorities; the statute law looking to the purity of the ballot, and the organic law having for its purpose the encouragement of independent action in matters relating to municipal government. The help will come from our possession of the situation in which the legislators were when, in 1899, they passed the statute in question, which was in part composed of the general drift of public opinion and the fault which that public opinion had found with the machinery for election of public officials. The settled conviction that the safeguarding of our institutions requires the untrammelled exercise of the franchise by the citizens and that the result be protected from fraud, has led us to no inconsiderable amount of legislation during the present generation—legislation aimed largely, although not entirely at the frauds of majorities, who have, at times, manifested a disposition to retain their power, let the cost be what it might. The frauds that have perhaps occasioned the greatest amount of discussion resulted from colonization and repeating, for the correction of which several registry acts were passed. At the outset the legislation on that subject proceeded on the view that only in great cities were such frauds practiced, but such view proved to be partial, and in 1890 a general registry law was passed applicable to all of the state except the cities of New York and Brooklyn. (Chapter 321 of the Laws of 1890.) In those cities registration had long been required. (Chapter 142 of the Laws of 1880.) An enlightened public sentiment was at the same time making war against the evils of bribery and the outcome was a new departure in our method of voting. . . . . .

Complaints had also been made that the practical effect of the power exercised by the organization was to render ineffective independent voting in purely municipal affairs, to the detriment of the best interests of the cities; and the recent constitutional convention (the work of which was subsequently ratified and adopted by the people) undertook to ameliorate the situation, to some extent, by providing that city officers should be elected at a different time than state officers, the election of the latter to take place in even, and the former, in odd numbered years, the reason assigned being that, unrestrained by national and state contests, the citizen would naturally be more independent, not only in voting, but in bringing about independent nominations whenever the party to which he belonged should attempt to make nominations intended to subserve the selfish purposes of the leaders rather than to promote the public interests.

Prior to 1882 there was no attempt to regulate by law the conduct of primaries, but chapter 154 of the laws of that year, known as the Chapin act, declared certain acts committed at primaries crimes, such as the false personation of a voter, intentionally voting without right, prevention of others from voting, and fraudulent concealment or destruction of ballots. It also required that the presiding officers and inspectors at such elections take the usual oath of inspectors at general elections, and provided for the challenge of voters and the administration of an oath to a person so challenged.

While these provisions reduced to a considerable extent the wrongs which had been committed against the voter who desired to participate in the selection of the candidates of his party, and made snap caucuses impossible and the selection of delegates by brute force extremely difficult, still the right of the general committee to prescribe tests or qualifications for a voter was in some instances so employed as to exclude from the participation in the primary many who were not in sympathy with the majority of the committee in all respects, and who might be termed members of a minority faction in the party. The not unnatural desire of the several general committees to perpetuate their power and control led, in some instances, to the making of "regulations" under which members who were not congenial to the majority were disciplined upon charges of disloyalty, inefficiency or mismanagement, and the places made vacant by their removal were oftentimes filled by men who, from choice or prudence, worked in harmony with the majority of the organization, for the latter term practical-

ly means the particular members of a party within a given territory who are, for the time being, in full control of its affairs.

In *McKane* v. *Adams*, 123 N. Y. 609, it appeared that the plaintiff was formerly a member of the Democratic association of his town and a delegate upon the general committee of the county. Charges were preferred against the town association and the trial resulted in its being disbanded. A reorganization of the town association was undertaken and a primary election thereupon ordered by the general committee of the county organization, at which the defendant was elected a delegate to the county committee. The general committee refused to accept the returns of the primary election and to recognize him as a delegate. It was held that membership in such an association is a privilege which may be accorded or withheld. And such being the status of a delegate to the general committee, that body could refuse to recognize the choice of a given constituency until such time as they should conclude to elect a delegate agreeable to the wishes of the majority, thus rendering futile all attempts at independent, otherwise termed "hostile" action.

These and other abuses, as they were called by the minority members of the party associations, became so common that a demand was made for a primary election law sufficiently comprehensive in scope to secure to all citizens equal rights in the primary elections, conventions and political committees with the party with which they were allied. This demand the legislature undertook to meet by chapter 179 of the Laws of 1898, which was amended (but not in respects affecting this question) by chapter 473 of the Laws of 1899. These acts recognize the equal importance of primary and general elections and model the conduct of the former upon the general lines and conduct of the latter. They provide for the enrollment of the voter, and the only exaction permitted precedent to his right to enroll is that he shall express an intention to support generally at the next general state or national election the nominees of such party for such state or national offices. Section 3 subdivision 1. No inquiry as to the past political conduct is permitted or promise as to future support of local candidates required. They provide for booths at public expense, in which the primary voter must in secret prepare his ballot; for ballots and their printing and subsequent folding so that the inspectors shall not be able to know for whom the ballot is cast; for the administration of an oath to a voter in case of a challenge; for challengers and watchers; for an annual primary

day, and that the polls shall be held open for a fixed period of time. The dominant idea pervading the entire statute is the absolute assurance to the citizen that his wish as to the conduct of the affairs of his party may be expressed through his ballot and thus given effect; whether it be in accord with the wishes of the leaders of his party or not, and that thus shall be put in effective operation, in the primaries, the underlying principle of democracy, which makes the will of an unfettered majority controlling. In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting the leaders to construct it from the top downwards.

Now, having in mind the purpose of this statute and the decision of this court in the *McKane* case—that membership in a county general committee is a privilege which may be accorded or withheld, not a right which can be gained independently and then enforced, inasmuch as the association is voluntary, being organized without a charter and regulated as to its action by a constitution and by-laws—let us further examine the statute to see whether the legislature intended to, and did, take away from the general committee, the power, for any cause whatsoever, to expel members elected thereto by the voters of a town or ward.

In the first place, the voluntary character of the county general committee has been destroyed, for the statute expressly commands that "*each shall have* a general committee for each county." There is but one way to gain membership, says the statute, and that is through the suffrages of the members of the party exercised "at the annual primary elections on the annual primary day" and at "public expense." (Section 4, subdivisions 2 and 3 and section 6.) . . . . .

And the general committee is commanded to meet and organize on "the day fixed by the rules and regulations of the party." At that meeting a member elected at the preceding town or ward primary may appear to assume the duties of the office to which he has been elected, and the production of a certificate of election from the "custodian of primary records, or a duplicte thereof, shall be sufficient to entitle the person named therein to be admitted to the . . . . . committee to which he shall have been elected. . . . . ."

Does the recital of these provisions suggest that the legislature intended that the committee should be the judge of the election or other qualification of its members, or that the primary voters would be the judge? What was the object of the legislation—

to protect the majority of the committee from enforced association with a disagreeable or "hostile" member, or to protect the right of the voters to have their wishes in party matters presented by their chosen representatives?

If the former, then legislation was not needed in that direction, for the general committee had a method of ridding themselves of offensive members, that was in full operation, as the *McKane Case* witnesseth. If the latter was the object of the legislature, it is difficult to see how it could have taken more certain measures for its accomplishment. It provided that the statute should *control* not only the *choice* but also the *conduct* of political committees. The choice of the member it vested absolutely in the voter at the primary, reserving no voice whatever in the matter to his associates in the committee. It provided many things for the conduct of the committee, but the right to expel a member was not one of them. Power was given to the committee to prevent a member who had failed to pay his annual dues "from participating in the meetings of such committee." Expulsion from, or forfeiture of, his office was not named as the penalty for non-payment of dues, but only exclusion from participation in the meetings. And it is apparent from a reading of the provisions that the words were chosen with a view of enabling a member to resume attendance of the meetings upon payment of dues. But if this provision were capable of being treated as authorizing expulsion for non-payment of dues, the maxim *expressio unius est exclusio alterius* would be applicable and call for a construction of the statute denying power to expel a member of the committee for any other reason.

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If I am right in the views expressed, no other question need be considered, for the statute manifests an intent not to allow the committee, on any pretext whatever, to remove the committeeman from office, and it is the duty of this court to give full force and effect to the legislative intent.

It has been suggested that it would be intolerable for the members of a general committee to associate with a member who is hostile to the ticket, and that it follows that the legislature must be presumed to have had such a situation in mind. I answer—without assenting for one moment that the legal conclusion follows from the proposition of fact standing alone—that it does not stand alone; that the legislature was confronted with what is regarded as an abuse of the rights of the citizens in party matters, which

compelled it to decide which was the lesser of two evils, to compel association occasionally with a member who is hostile to some portion of the party candidates or a majority of the committee, or to permit the general committee to deprive the primary voters of the choice of a representative. It decided that the wrongs that had been and were being done to the primary voters exceeded that which would result from occasional association with a hostile member. In other words, it was determined that the majority of the primary voters were entitled to select any representative they might desire, who would be responsible to those electing him, and only to them, for his conduct in office. That determination should be given effect by the decision of this court agreeably to that well-understood canon of construction that commands the court in construing a statute to give effect to the intention of the legislature.

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The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs.

CULLEN, J. (dissenting).

The order appealed from should be affirmed, with costs.

Haight, Vann and Landon, J. J., concur with Parker, Ch. J., for reversal; O'Brien, J., concurs with Cullen, J., for affirmance; and Bartlett, J., concurs with the result reached by Cullen, J.

Order reversed, etc.

But the title to a party office may not be tried by quo warranto since such a position is not a public office. Attorney General v. Drohan, 169 Mass. 534.

II. THE LAW OF APPOINTMENT.[1]

1. *Nature of the Power to Appoint.*

PEOPLE EX REL. BALCOM V. MOSHER ET AL.

Court of Appeals of New York. May, 1900.
163 N. Y. 32.

Appeal from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 28, 1899, reversing an order of special term granting a peremptory writ of *mandamus* commanding the defendants to appoint the relator to the position of superintendent of streets and city property of the

[1] The power of appointment is not included within the executive power vested in the governor by the state constitution. Fox v. McDonald, 101 Al. 51.

city of Binghamton for a probationary term of two months, and denying the motion for such writ.

The charter of that city provides that the mayor shall appoint four commissioners who shall constitute a board to be known as the board of strcet commissioners of the city of Binghamton; that it shall have the management and control of the street department and its powers and duties are defined. It then declares that on the second Tuesday in February of every alternate year the board shall appoint a superintendent of streets and city property. . . .

The position of superintendent became vacant February 1, 1899, by the expiration of the term of the previous incumbent. In the following April the municipal civil service commission certified to the board of street commissioners the names of three persons appearing upon the eligible list prepared by the commission as a result of a competitive examination therefor. Upon the list were the names of Bolles, Balcom and Seabury. Bolles stood highest, Balcom next and Seabury last. Balcom and Seabury were both honorably discharged soldiers of the army during the late Civil War, and as such were entitled to preference over Bolles.

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The Special Term held that the civil service law of 1899 was constitutional, and that it required the street commissioners to appoint to the office of street superintendent the veteran who stood highest upon the eligible list furnished by the local civil service commissioners. Upon appeal the Appellate Division held that the act of 1899 was unconstitutional so far as it required the appointment of the person standing highest upon such list, and reversed the judgment of the Special Term.

MARTIN, J. The only controversy upon this appeal relates to the constitutionality of the civil service statute of 1899. The question involved is the power of the Legislature to abrogate the right conferred by the State Constitution upon the local authorities of a city to appoint such of its officers as are not directed by the Constitution to be elected or otherwise appointed. (Sec. 2, Art. 10.)

The office of superintendent of streets and city property of the city of Binghamton falls within this statute, and, if valid, it is controlling as to the appointment of an incumbent of that office. The provisions of the Constitution, by which its validity is to be tested, are section 2 of article 10 and section 9 of article 5.

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In interpreting the Constitution it is to be considered as a whole,

complete in itself: force is to be given to every provision contained in it, and each clause explained and qualified by every other.

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Therefore, these two provisions should be construed together, giving force to both, and to each should be accorded its appropriate place and proper effect, with some office to perform, and at the same time they should be so construed as to operate harmoniously. We find no repugnancy between these sections of the Constitution. Section two has been a part of the organic law of the State for many years, and obviously it was not intended to be superseded or changed, as no language was employed in the Constitution of 1894 to indicate any such purpose. Moreover, the proceedings of the constitutional convention show that it was intended to be continued in force in its existing form. Section nine was an amendment adopted in 1894. Both being part of the present Constitution, the most that can be claimed is that they should be read and construed together. Reading the amendment of 1894 into section two, it in effect provides that all city officers whose election or appointment is not otherwise provided for by the Constitution shall be appointed by such authorities thereof as the Legislature shall designate for that purpose, which appointments shall be made according to merit and fitness to be ascertained by competitive examinations so far as practicable. When thus read, it becomes manifest that under the Constitution the power of appointment still remains in such local authorities as the Legislature has designated for that purpose. No alteration in that respect has been made or attempted. The only change effected by the amendment of 1894 is the requirement that the local authorities in making such appointments shall make them "according to merit and fitness," to be ascertained by examinations, competitive or otherwise. The amendment relates only to the qualifications which appointees shall possess to justify their appointment under section two, and the manner in which they shall be ascertained. Thus the power of appointment is still vested in the local authorities of the various municipalities of the State, and the amendment has wrought no change as to the officers or bodies who are to make such appointments.

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While the Legislature is authorized to designate the local authorities who are to appoint, yet, when they are thus designated, their actual power becomes constitutional and is controlled by that instrument. In this case the local authorities so designated to ap-

point a superintendent of streets and city property were the board of street commissioners of the city of Binghamton, and, hence, the board alone had power under the Constitution to make an appointment to fill that office. Yet the Special Term, without permitting it to in any way exercise that power, held the statute of 1899 to be valid, and that under it the board had no right of selection or choice between the several candidates certified as eligible to the place or between the two veterans who were so certified, but that it was absolutely bound to appoint the one veteran graded highest by the civil service commission and granted a peremptory *mandamus* commanding the board to appoint that person.

If the civil service commissioners have power to certify to the appointing officers only one applicant of several who are eligible and whom they have, by their own methods ascertained to be fitted for a particular position, and their decision is final, or if where more are certified the one graded highest must be appointed, then the civil service commission becomes and is the actual appointing power. To reach such a result, however, it must be held that the word "appointment" as used in the Constitution is not to be given its usual and ordinary meaning, but may be so limited and restricted as to leave in the local authorities a mere ministerial duty, with no discretion, nor choice, nor responsibility in respect to the person to be appointed. Such a construction would completely nullify the provision of the Constitution which confers the power of appointing city officers upon the local authorities of the municipality. A fair reading of the Constitution leads to no such result.

Early in the history of the civil service reform in this country the signification of the word "appointed" was considered in connection with the United States civil service statute. The United States Attorney-General, in discussing that question, said: "If to appoint is merely to do a formal act, that is, merely to authenticate a selection not made by the appointing power, then there is no constitutional objection to the designation of officers by a competitive examination, or any other mode of selection which Congress may prescribe or authorize. But if appointment implies an exercise of judgment and will, the officer must be selected according to the judgment and will of the person or body in whom the appointing power is vested by the Constitution, and a mode of selection which gives no room for the exercise of that judgment and will is inadmissible. If the President in appointing a marshall, if the Senate in appointing its secretary, if a court or head of a department in appointing a clerk, must take the individual whom

the civil service board adjudge to have proved himself the fittest by the test of a competitive examination, the will and judgment which determine that appointment are not the will and judgment of the President, of the Senate, of the court, or of the head of the department, but are the will and judgment of the civil service board, and that board is virtually the appointing power." Opin. U. S. Atty. Gen., vol. 13, p. 516.

A subsequent report of the United States Civil Service Commission contained the following statement upon this subject: "The appointing power, conferred by Congress upon the heads of departments, under the strict terms of the Constitution, is a power of choice—a right of selection for appointment from among several. That opportunity of choice is inseparable from the power itself. . . . . A choice between four seems to preserve the authority of the appointing power, and to allow a sufficient variety of capacity for answering the needs of the public business. For both these reasons, a requirement that the applicant graded highest be taken would be indefensible." Report of 1884.

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The decisions of this and other courts, State and Federal, as to the meaning of the word "appointment," and what constitutes an appointment under the law, are to the effect that the choice of a person to fill an office constitutes the essence of the appointment; that the selection must be the discretionary act of the officer or board clothed with the power of appointment; that while he or it may listen to the recommendation or advice of others, yet the selection must finally be his or its act, which has never been regarded or held to be ministerial. 19 Am. and Eng. Enc. of Law 423; *Johnston* v. *Wilson*, 2 N. H. 202; *Hoke* v. *Field*, 10 Bush (Ky.) 144; *People* v. *Fitzsimmons*, 68 N. Y. 514; *Marbury* v. *Madison*, 1 Cranch 137; *Craig* v. *Norfolk*, 1 Mod. 122; *People ex rel. Babcock* v. *Murray*, 70 N. Y. 521; *Taylor* v. *Kercheval*, 82 Fed. Rep. 497, 499; *Menges* v. *City of Albany*, 56 N. Y. 374; *People ex rel. Killeen* v. *Angle*, 109 N. Y. 564, 573. Thus it is seen that the authorities upon the subject . . . . . all agree in the conclusion that the power of selection for a public office is and should be vested alone in the officers or boards authorized to appoint, although it be limited to persons possessing the qualifications required by the civil service statutes and rules, and that at least some power of selection is necessary to constitute an appointment, which should

be exercised by the local authorities, independently of the civil service commission.

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Moreover, by section ten of the act of 1899, if the mayor for any reasons fails to appoint municipal civil service commissioners, the right to appoint them is conferred upon the State commission until the expiration of the term of the mayor then in office, and until their successors are appointed and qualify. The State commissioners are also authorized to remove any municipal civil service commissioner for cause. Therefore, there may be circumstances under which the selection of all the appointive officers of a city will be controlled by the State civil service commissioners, and thus the people and local authorities of the municipality be deprived of any voice in the selection of its officers. If it be said that no such condition has arisen in this case, the answer is that the validity of this statute must be determined by the nature, character and scope of the powers attempted to be conferred, although they have not been actually exercised. *Stuart* v. *Palmer,* 74 N. Y. 183; *Coxe* v. *State,* 144 N. Y. 396; *Gilman* v. *Tucker,* 128 N. Y. 190; *Colon* v. *Lisk,* 153 N. Y. 188, 194.

I fancy it would be difficult to imagine a construction of the Constitution which would more completely surprise the inhabitants of the various municipalities or political divisions of the State, or that would work greater injury to fair and proper civil service reform, than one which would hold that the principle of local self-government for cities, villages and other municipalities of the State has been so far abrogated by the amendment of 1894 that the power of appointment of their local officers may be transferred from their local authorities to a centralized commission of State appointees and thus the principle of local self-government practically destroyed.

Although this Court in effect held that the statute of 1883 and the rules adopted by the civil service commissioners under it, which required that officers to be appointed should be selected from the highest three of the eligible list, was valid (*People ex rel. McClelland* v. *Roberts,* 148 N. Y. 360; *Chittenden* v. *Wurster,* 152 N. Y. 345, 358) still, when the Legislature has, by statute, undertaken to deprive the local authorities of all right of selection and appointment, it has exceeded its constitutional power and the act is clearly in conflict with the provisions of the organic law and invalid.

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This order should be affirmed with costs.

PARKER, Ch. J., O'BRIEN and HAIGHT, JJ., concur; BARTLETT and VANN, JJ., not voting; LANDON, J., not sitting.

Order affirmed.

But if the power to appoint is not a constitutional power the legislature may provide that the one standing highest on the list shall be appointed. People v. Kipley, 171 Ill. 44.

THE STATE EX REL. WORRELL V. PEELLE.

Supreme Court of Indiana. May, 1890.
124 Indiana, 515.

BERKSHIRE, J. This is the second time this case has been in this Court. *State ex rel.* v. *Peelle,* 121 Ind. 495.

. . . . . .

When the case was here the first time the whole contention was as to the power of the Legislature under the Constitution to designate the incumbent to the office in question.

The appellee rested his claim to the office upon an election by the Legislature, and the appellant's relator relied upon an appointment from the executive of the State.

The appellee now claims title to the office by virtue of an appointment from the executive of the State, while the appellant's relator assumes the same position as heretofore.

. . . . . .

And the question now is, does the appellee hold the office in question by appointment from the executive department of the government?

As we now understand the position of the appellee, it is that he holds the office (1) by appointment from Governor Porter, and (2) by appointment from Governor Gray.

For two sufficient reasons the appellee received no appointment to the office in question from Governor Porter, the second of which applies with equal force to the action of Governor Gray.

. . . . . .

The second reason why the appellee did not secure an appointment from the executive is that the appointing power lodged with him under the Constitution was never invoked in behalf of the appellee, and so long as it was not called into exercise there could be

no appointment, although the Governor could at any time call it into action.

It appears that the General Assembly assumed (and it was but an assumption) to take from the executive department the power therein vested under the Constitution to designate the incumbent of the office in question, and not only so but to legislate the rightful incumbent of said office out of office before the expiration of his term, and to take unto themselves the election of an incumbent to said office, and as the result the General Assembly elected the appellee and gave him a certificate of election.

The first election occurred on the 3d day of March, 1883, and upon a certificate thereof being presented to the executive he issued the following commission:

"*The State of Indiana. To all who shall see these Presents, Greeting:*

"Whereas, It has been certified by the proper authority that, at a joint convention of the two Houses of the fifty-third General Assembly, held in the hall of the House of Representatives, March 3d, 1883, that William A. Peelle, Jr., was elected Chief of the Bureau of Statistics.

"Therefore, Know ye, that in the name and by the authority of the State aforesaid, I do hereby appoint and commission William A. Peelle, Jr., Chief of the Bureau of Statistics aforesaid, to serve as such for the term of two years from the 8th day of March, 1883, and until his successor shall have been elected and qualified.

"In witness whereof, etc.

"By the Governor: ALBERT G. PORTER.

W. R. MYERS, Secretary of State."

There was no pretense that the appellee held any other title to the office than that which the said election conferred upon him, and when we remember the aggressive attitude of the General Assembly at that time with reference to its power to elect the incumbents to a large class of offices, including the one in question (and of this we take judicial knowledge), the appellee would not have been willing to have recognized the executive department as the source of his title. The Governor was careful to recite in the commission the nature of the appellee's title and that he commissioned him as the chosen of the General Assembly. That it was the purpose and intention of the Governor, when he issued the commission, to deliver to the appellee the evidence of his title as derived from the Legislature, and to make it distinctly appear that he was in no sense

the appointee of the executive, is so manifest that there is no ground for a contrary contention to rest upon. But in addition to what appears on the face of the commission, the records of the executive office disclose the fact that the commission was issued to the appellee because and on account of his election by the General Assembly. We know of no sufficient reason why these records are not competent evidence. They are the records kept in a public office of the official acts of the chief executive officer of the State.

. . . . . .

But it is contended that by some kind of legal fiction the appellee, each time he was commissioned by the Governor, became his appointee.

This contention is not very clearly defined, but proceeds, as we understand it (in part, at least), upon the theory that all persons are presumed to know the law, and that this presumption applies as well to public officers as to individuals; and, as Governors Porter and Gray are presumed to have known, when they commissioned the appellee, that the General Assembly had no power to elect him to the office, that the presumption must prevail that they intended by their official acts in commissioning him to appoint him to the office, and that this presumption must prevail, over their expressed intention to the contrary; or, to express the contention in other language, though they intended by their official acts to do one thing, and, in fact, did what they intended, that in law they did something else. This is carrying the doctrine of presumptions beyond precedent, and, we think, beyond reason.

. . . . . .

On the 9th day of February, 1885, the Legislature again elected the appellee to the office in question, and thereafter, upon a certificate of election, the Governor issued to him a commission.

In 1887 there was no election, and the appellee continued to hold the office until 1889, when the Legislature again elected him to the office, and on presentation of his certificate of election to the Governor, a commission was refused, and the Governor having appointed the appellant's relator and commissioned him, this controversy arose.

The following is the appellee's commission from Governor Gray:

"*The State of Indiana. To all who shall see these Presents, Greeting:*

"Whereas, It has been certified to me by the proper authority that William A. Peelle, Jr., has been elected to the office of Chief of

the Bureau of Statistics of the State of Indiana, by the General Assembly on the ninth day of February, A. D. 1885.

"Therefore, Know ye, that in the name and by the authority of the State aforesaid, I do hereby commission the said William A. Peelle, Jr., as said Chief of the Bureau of Statistics of the State of Indiana for the term of two years from the eighth day of March, 1885, and until his successor shall have been elected and qualified.

"In witness whereof, etc.

"By the Governor: ISAAC P. GRAY.

WILLIAM R. MYERS, Secretary of State."

We have nothing to add with reference to Governor Gray's action, except to say that he seemed to be more careful, if possible, than his predecessor to emphasize the fact that the appellee was not his appointee, but was commissioned as the chosen of the General Assembly. The word "appoint" is found in the commission issued by Governor Porter, but nowhere appears in that of Governor Gray.

But the further contention of the appellee is, that as the appointing power was lodged with the executive of the State, his purpose or intention in commissioning the appellee can not be inquired into; that notwithstanding the purpose is disclosed in the face of the commission, all of its recitals must be disregarded, and the commission treated as an appointment made by the executive. Much that we have already said is here applicable.

This is but contending for a conclusive presumption that you must take an officer to mean one thing when he does another.

As the appointing power was lodged in the executive when he commissioned the appellee, had the commission recited an appointment, or had it been silent as to the source of the appellee's title to the office, then no doubt the commission would have been conclusive, for the very good reason that the mental operations of the Governor's mind, unexpressed in the act, could not be inquired into, and if for no other reason such inquiry would be impracticable. But where the source of title is lodged somewhere else than with the executive, his commission is only *prima facie* evidence of title. *Board, etc.*, v. *State ex rel.*, 61 Ind. 379; *Reynolds* v. *State ex rel.*, 61 Ind. 392; *Hench* v. *State ex rel.*, 72 Ind. 297; *State ex rel.* v. *Chapin*, 110 Ind. 272; *Marbury* v. *Madison*, 1 Cranch 137.

This Court has gone so far as to hold that even after the Governor has issued a commission, if it appears that he has commissioned a wrongful claimant, to the prejudice of one who is rightfully

entitled to the office, he may issue the second commission. *Gulick* v. *New*, 14 Ind. 93.

The same reasons which make the Governor's commission conclusive, when silent as to the source of title, that the person commissioned is the Governor's appointee, where he has the power to appoint an incumbent to an office, render his commission conclusive that such person is not his appointee when it recites that the person commissioned derives his claim of title because of an election by the people or Legislature, and is commissioned because thereof.

We hold that when the appellant's relator was appointed there was a vacancy in the office, which the Governor was empowered to fill by appointment until there should be an election by the people.

Judgment reversed, with costs.

ELLIOTT, J., and MITCHELL, Ch. J., dissenting. . . . . .

As to the power to appoint to fill vacancies, see Fritts v. Kuhl, 51 N. J. L. 191, and People v. Ward, 107 Cal. 236 *infra*. In most states the legislature may itself appoint to office. People v. Freeman, 80 Cal. 233; People v. Mayor, 15 Md. 376; People v. Bennett, 54 Barb. 481.

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2. *How Exercised.*

PEOPLE EX REL. BABCOCK V. MURRAY.

Court of Appeals of New York. September, 1877.
70 N. Y. 521.

ALLEN, J. At the time of the expiration of the term of office of the defendants in 1873, the power to appoint their successors was in the mayor of the city of Lockport, and the assent or approval of the common council was not required, and all acts of the common council in affirming any nomination to the office, or ratifying the action of the mayor in making an appointment, were nullities. Laws of 1870, ch. 175, sec. 2; *People* v. *Gates*, 56 N. Y. 387; *Same* v. *Fitzsimmons*, 68 id. 514. The learned judge by whom the action was tried has found as a fact "that in the month of April, 1873, the relators were duly appointed to the office of excise commissioners of the city of Lockport in place of the defendants," and to this finding there is an exception as not only not warranted by, but as against evidence. The evidence discloses the fact, which is

undisputed, that the only action of the mayor was a verbal nomination of the relators to the common council for appointment to the office. The vote of the common council and the record of their action upon the nomination must be laid out of view as *ultra vires*, and without efficiency. They add nothing to the verbal declaration and statement of the mayor, and the claim is that such nomination was a verbal appointment of the persons named to the office, the completed act of the mayor making the appointment; that an appointment by parol without writing is a valid exercise of the power to appoint, and this proposition must be sustained or the respondents cannot hold their judgment. In the *People* v. *Fitzsimmons* we held, with considerable hesitation and not without great doubts, that a nomination of the mayor of Albany to the common council of that city, and for their action, of individuals for office under the same statute, in writing, signed by the mayor officially and filed with the clerk of the common council, in the absence of any statute prescribing the form of the appointment or of the commission to be issued, followed by the taking of the oath of office by the persons named before the mayor, was a sufficient appointment by the mayor under the statute. No stress was laid upon the action of the common council. The paper writing signed by the mayor officially, although addressed to the common council and in the form of a nomination of the persons to that body, was an official appointment to the office by the mayor, and a substantial compliance with the statutes.

. . . . . .

There is no color in the opinion, or in any statute of this State, or any custom or usage of which we have knowledge, for claiming that an appointment to any civil office can be made verbally or without a proper writing evidencing the fact.

It would be unfortunate if the title to office of one upon whose official acts public interests and private rights hinged, did or could be made to depend upon the verbal declarations and statements of the persons having the power to make the appointment, to be proved by parol and liable to be forgotten, misunderstood or misreported, subject to all the contingencies and infirmities which are incident to verbal evidence, or evidence by parol, so pregnant of mischief and misfortune as to have led to the enactment of the statute of frauds. It will not be presumed that the Legislature, while making void contracts involving trifling pecuniary interests unless evidenced by some writing, intended that important civil offices should be conferred without a commission or any writing, but simply by a

verbal statement of an individual in any form which by the bystanders should be understood as expressing a present intent to make the appointment; and a liberal interpretation will be given to the statutes bearing upon the subject if necessary to avoid any such conclusion.

. . . . . .

. . . . . The Constitution and the laws of the State create or provide for the creation of all the offices, and prescribe the mode of election or appointment, the terms and duration of office, as well as regulate the duties and emoluments. Offices in certain cases, may be for a term of years, during the pleasure of the appointing power, or during good behavior; but whatever may be the term or tenure of office, the appointment must be in conformity with the statutes of the State. An appointment in the general sense of the term may be by deed or in writing without seal or verbal, depending upon the subject-matter of the appointment and the terms of the authority under which it is made. But an appointment to office by the person or persons having authority therefor, as distinguished from an election, can only be made verbally, and without writing when permitted by the terms of the statute conferring the power. Affecting the public, and not merely private rights, and being done under the authority of the sovereign power and not under individual authority, it should be authenticated in a way that the public may know when and in what manner the duty has been performed.

. . . . . .

. . . . . The statute (1 R. S. 118, sec. 19) clearly contemplates a commission, the form of which is not prescribed, which shall be the conclusive evidence of an appointment to a civil office. The article in which the section is found is entitled, "Of nominations to offices and the commissions of officers," and after making provision for officers appointed by the Governor and Senate, and by the Governor, and all the elective officers, and commissioners of deeds (then appointed by the county judges and boards of supervisors in joint convention), it provides in the last section that "the commissions for all other offices, when no special provision is made, shall be signed by the presiding officer of the board or body, or by the person making the appointment." The language includes every civil office within the State not excepted from its operation by statute, and was clearly intended to prescribe the mode of appointment. The appointment under this delegated authority is inchoate until the last act to be done by the appointing power is completed,

and that is the signing of the writing or the commission. The appointment is then ,and not before, "evidenced by an open unequivocal act." Ch. J. Marshall in *Marbury* v. *Madison, supra,* says: "Some point of time must be taken when the power of the executive over an officer not removable at his will must cease; that point of time must be when the constitutional power of appointment has been exercised; when the last act required from the person possessing the power has been performed. The last act is the signature of the commission." It is not discretionary with a person having the power to appoint to office; whether there shall be a commission; the signing of the commission is an integral part of the duty of the delegated power, and necessary to a perfect and complete execution of the power entitling the appointee to assume the duties of the office.

. . . . . .

. . . . . *Johnston* v. *Wilson,* 2 N. H. 202, related to an elective office, and Mr. Justice Woodbury says: "On general principles, the choice of a person to fill an office constitutes the essence of his appointment. After the choice, if there be a commission, an oath of office, or any ceremony of inauguration, these are forms which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable." But in the case of an appointment by one representing the public, the choice can only be made under our statute by the commission by which it is evidenced. That is the making of the choice; the act which is effectual, as unequivocal and final.

The relators have no title to the office in dispute. The defendants hold the office by statute "until others shall be appointed in their places." No such appointment has been made, and they have not resigned, or in any way vacated their offices. They could not, by their act or assent, transfer the office to the relators, or relieve themselves, except in one of the ways designated by statute. *Johnston* v. *Wilson, supra,* 1 R. S. 122, Sec. 34.

The office is not vacant, and the defendants are the legal incumbents. The judgment must be reversed, and judgment given for the defendants.

All concur.

Judgment accordingly.

But see Hoke v. Field, 10 Bush. Ky. 144, which holds that an oral appointment in open court is good where the law does not require that the appointment shall be in writing.

3. *When Exercised.*

MARBURY V. MADISON.

Supreme Court of the United States. February, 1803.

1 Cranch 137.

At the last term, viz., December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, Esq., late Attorney-General of the United States, severally moved the court for a rule to James Madison, Secretary of State of the United States, to show cause why a *mandamus* should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the District of Columbia.

. . . . . .

On the 24th of February, the following opinion of the court was delivered by the Chief Justice (Marshall).

Opinion of the court.

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the Secretary of State to show cause why a *mandamus* should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia.

. . . . . .

In the order in which the court has viewed this subject, the following questions have been considered and decided:

1st. Has the applicant a right to the commission he demands?

2ndly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands?

His right originates in an act of Congress passed in February, 1801, concerning the District of Columbia.

. . . . . .

It appears, from the affidavits, that in compliance with this law, a commission for William Marbury, as a justice of the peace for the county of Washington, was signed by John Adams, then President of the United States; after which the seal of the United States

was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the Constitution declares, that "the President shall nominate, and by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."

The 3d section declares, that "he shall commission all the officers of the United States."

An act of Congress directs the Secretary of State to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the Senate, or by the President alone, provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

These are the clauses of the Constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1st. The nomination. This is the sole act of the President and is completely voluntary.

2d. The appointment. This is also the act of the President and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.

3d. The commission. To grant a commission to a person appointed, might, perhaps, be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States."

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the Constitution: The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision in the second section of the second article of the Constitution, which authorizes Congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of de-

partments;'' thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the Constitution which requires the President to commission all the officers of the United States may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence, the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same as if in practice the President had commissioned officers appointed by an authority other than his own.

It follows, too, from the existence of this distinction, that if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

This is an appointment made by the President, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the President, must be completely evidenced, when it is shown that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then

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passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will,* must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission.

. . . . . .

The commission being signed, the subsequent duty of the Secretary of State is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission ,and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed that the solemnity of affixing the seal is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to vest the person with his office has been done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

. . . . . .

* In Parsons v. United States, 167 U. S. 324 and Shurtleff v. United States, 189 U. S. 311, the Supreme Court has since decided that the President has an arbitrary power of removal of all officers of the United States not judges of the United States; not including the territorial courts.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission is a practice directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom the duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed, not to a person to be appointed, or not, as the letter enclosing the commission should happen to get into the post office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to enquire whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted but that a copy from the record of the office of the Secretary of State would be, to every intent and purpose, equal to the original. The act of Congress has expressly made it so.

. . . . . .

In the case of commissions, the law orders the Secretary of State to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of the peace to proceed in the performance of his duty, because it would equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance.

The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity.

It is, therefore, decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable: and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating the office gave the officer the right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

. . . . . .

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast upon the jurisprudence of our country, it must arise from the peculiar character of the case.

. . . . . .

Is it in the nature of the transaction? Is the act of delivering or withholding a commision to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our Constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy?

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

. . . . . .

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of the act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to the case under the consideration of the court.

The power of nominating to the Senate and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right was vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one, in consequence of which a suit had been instituted against him, in which his defence has depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question ex-

aminable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the President, the seal of the United States was affixed to the commission.

It is, then, the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of the peace for the county of Washington, in the district of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies.

This depends on,

1st. The nature of the writ applied for; and,

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his commentaries, page 110, defines a *mandamus* to be "a command issued in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."

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This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice." Or, in the words of Lord Mansfield, the applicant in this case, has a right to execute an office of public concern, and is kept out of that right.

These circumstances certainly concur in this case.

Still, to render the *mandamus* a proper remedy, the officer to whom it is to be directed must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus* directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his con-

duct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden; as, for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what grounds the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

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It is true that the *mandamus*, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission, on which subject the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him than by any other person.

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This, then, is a plain case for a *mandamus*, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts ap-

pointed, or persons holding office, under the authority of the United States."

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The Constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the Constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible unless the words require it.

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To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already insituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. . . . .

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may stop here or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.

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Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law

of the nation, and, consequently the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution: or conformably to the Constitution, disregarding the law; the court must decide which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

. . . . . .

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

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From these, ... it is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of the courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? The oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion upon this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the *Constitution* and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *Constitution* is itself first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the Constitution have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that *courts*, as well as other departments, are bound by that instrument.

The rule must be discharged.

See also Speed v. Common Council of Detroit, 97 Mich. 198 *infra*. In the case, however, of an appointment by a legislative body, the action of the legislative body in making an appointment may be reconsidered in accordance with the rules. Attorney Gen. v. Oakman, 126 Mich. 717.

STATE EX REL. FLEMING V. CRAWFORD.

Supreme Court of Florida. June, 1891.

28 Fla. 441.

The alternative writ, the declaration in causes of this character, states that on the 22nd day of September, of the present year, the relator, Francis P. Fleming, the Governor of this State, he having ascertained and determined that a vacancy existed in the office of United States Senator from this State, did, in exercise of the power conferred upon him by law, proceed to appoint Robert H. M. Davidson, a citizen of the State, having all the legal qualifications for such office, to be United States Senator from Florida, to fill such vacancy until the meeting of the next legislature; and that to evidence and give effect to such appointment, the petitioner prepared and signed an appointment or commission.

. . . . . .

That thereupon the said Governor caused the said appointment or commission to be transmitted to the defendant, John L. Crawford, Secretary of State, of this State, and instructed and directed him to seal it with the great seal of the State and to countersign the same as due and proper attestation of the executive act of such appointment, to be delivered to said Davidson as his full and complete appointment to be such United States Senator, and the evidence thereof, but that the said Crawford, Secretary of State, in disregard of his duty in the premises, failed and refused to seal the said appointment or commission with the great seal of the State and to countersign the same, and has failed and refused and still refuses to do so to the great prejudice and injury of the people of the State.

That afterwards, on or about October 13th, 1891, the said Governor required and instructed William B. Lamar, the Attorney General of the State, to institute proceedings in this court to procure the writ of *mandamus* to require the said Secretary of State to seal such appointment or commission with such seal and to countersign the same, but the Attorney General has failed and refused and still refuses to institute the proceedings.

The writ then recites the prayer of the petition: that, in order to protect and secure the public interests in the premises, and to enforce and carry into effect his said executive act as such Governor, the writ may issue, and in compliance with such prayer,

directs the Secretary of State to seal and countersign the said appointment or commission, or to show cause on the day and at the time mentioned therein, why he had not done so.

On the 29th day of October, at the time stated in such writ, the Secretary of State made return to such writ.

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RANEY, C. J.:

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2nd. It appears that on the fourth day of August last the Governor issued an address to the people of Florida, announcing as his judgment and conclusion that the action of the joint assembly of the legislature taken on the 26th of May last, at which Mr. Call received the votes of fourteen senators and of thirty-seven representatives, and Mr. Mays received the vote of one representative, and at which the president of the joint assembly announced that Mr. Call having received a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting, was duly elected United States Senator for the term beginning March 4, 1891, was not an election of Mr. Call, and the reason, as is shown by the return before us, is that a majority or quorum of the senate was not present at, and did not participate in such election. In this paper the Governor also announced that he could not "in the discharge of his duty" certify that Mr. Call was elected, and gives a full statement of the grounds upon which his conclusions are based. On the 22nd day of September the Governor prepared and signed the appointment of Mr. Davidson set out in the preceding statement of the case before us, and it will be observed that this appointment recites that a term of office of United States Senator held by Mr. Call had expired on the third day of March last during a recess of the legislature, and that thereby a vacancy happened in such office, and that no Senator had been chosen by the legislature to fill such vacancy, and that the legislature was not in session, but, on the contrary, a recess thereof existed at the time, and upon these premises so recited, the Governor by virtue of the authority vested in him by the Constitution of the United States appoints Mr. Davidson to be United States Senator from Florida until the next meeting of the legislature.

The election mentioned is set up by respondent as a bar to the allowance of a peremptory writ. . . . .

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The Constitution of the United States has not . . . given

to this court the power to pass upon the question of the legality of the election of a United States Senator, but . . . it has expressly excluded from it the right to do so. The constitution of the State has not attempted to confer any such power upon us, nor has Congress, nor our own legislature; nor is it to be imagined that any such attempt would be made. Whether Mr. Call was legally elected by the legislature, is not for us to say.

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The question occurs to me, however, that admitting we cannot decide upon the legality of the election, is it not a sufficient answer to the application for this writ, that the joint assembly is shown to have done what it in fact did and as it was constituted, and to have announced through the presiding officer the same to be a legal election. It is, we find, after the most careful consideration, impossible to pursue this course without usurping the functions of the Senate. . . . . Whether the constitution gave the Governor power after the adjournment of the legislature to appoint, was a question which addressed itself primarily to the Governor, and however erroneous may be the conclusion which he has reached, he has in fact made a decision in favor of his power, and has proceeded to the extent indicated by this record, in making an appointment to fill what he holds to be a vacancy within the meaning of that clause of the constitution which confers upon him the power of appointment. We cannot close our eyes to this fact as an existing feature in the case before us any more than to the action of the legislature or any other fact shown by the record. It cannot be said that as between the Governor and this court, it was not a matter for his decision. We cannot hold, then, that the simple fact of the legislature having taken the action set up constitutes a bar to the proceeding sought at our hands, without usurping the power to decide that this action, however illegal or ineffectual it may be held by the senate, precluded any action by the Governor; or, in other words, deprived him of the power to act. To decide this question would be to do what the constitution has devolved upon the senate exclusively. It is a question as to the relative validity of legislative and executive action, of which we have no jurisdiction. What we cannot do, the Secretary of State cannot do, and for the same reason that the power has not been placed in him unless it is implied by the imposition upon him of the duty to seal and countersign this commission, if such duties have been put upon him is a question to be hereafter considered. He cannot, unless the power to do so is implied by the imposition of the stated

duties, decide that the appointment of Mr. Davidson is illegal, or that it is so because the election of Mr. Call was legal, and no vacancy existed, and consequently the Governor had no power to appoint. The erroneous exercise of power by either the Governor or the legislature confers no power on either the Secretary of State or us, and in our conduct we should leave the action of each to be judged of by the Senate, and perform such duties as the law has placed upon us, without assuming any responsibility not imposed upon us. Knowledge on our part of what may have been the decision of the Senate in any analogous case does not create power or jurisdiction in this court. Unless there is in the nature of the act of sealing and countersigning, the implied power of passing upon the legality of the Governor's action, the Secretary has no more power to do so and refuse to attest the Governor's act than he would have had to refuse Mr. Call a certified copy of the proceedings of the legislature, of whose records he is, under sec. 21, Art. IV. of the constitution, the keeper, had it been his judgment that the election by the legislature was illegal and void. In certifying and giving such copy he performed a duty imposed upon him which in nowise involved or implied what his personal judgment of the validity of that election is, and the law does not give him any official judgment as Secretary of State in the premises.

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4th. The foregoing conclusions bring us to the question, whether or not under the law obtaining in this State it is the duty of the Secretary of State to affix the seal of State to this commission and countersign the same

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We see from the provision of our own constitution . . . that the purpose of its framers, and the people who adopted it, was that all commissions issued by the State should be sealed with the great seal of State, signed by the Governor and countersigned by the Secretary of State. That it is, under this section, the official duty of the officers named to sign and countersign, and the duty of the Secretary of State, who, by another section of the same article, is made the custodian of the seal, and whose countersigning is an attending testimony of the authorized use of such seal, to seal all commissions emanating from the State is the only interpretation of the organic law that would not violate common reason. What is a commission in the sense in which it is here used? It is written authority or letters patent issued or granted by the government to a person appointed to an office, or conferring public

authority or jurisdiction upon him. . . . . In the *United States* v. *Le Baron,* 19 How. 73, it was held that when a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete; that Congress might provide, as it had done in that case, that certain acts should be done by the appointee before he should enter upon the possession of the office under his appointment. That such acts became conditions precedent to the complete investiture of the office, but they were to be performed by the appointee, not by the executive; that all the executive could do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions his title to enter on the possession of the office is also complete. Judge Westcott, speaking for the Justices of this court under date of October 28th, 1875, said: "When the commission of a Justice of the Peace is signed and sealed, all that is necessary to his investiture of the office is complete. Under the practice of this State, all the conditions as to taking oaths, etc., are complied with before the commission issues. To him, upon the signing and sealing of the commission belongs the office." *Advisory Opinion,* 15 Fla., 735, 738-9.

There can be no doubt that the word "commissions," as used in the above section of our constitution at least includes appointments to office. The provision in the constitution of the United States, that the executive of any State may under the circumstances therein specified "make temporary appointments" of Senators, carries with it the power to issue written evidence of any such appointment, and not only this, but it implies a duty to do so. It imports that the executive authority of the State shall execute such evidence of the authority of the appointee as can be presented to the Senate of the United States and be passed upon by that body. Such credentials must, in the very nature of things, to serve these ends, be written and cannot be in parol. . . . . .

Any written appointment of a person to an office by the Governor of this State is a commission, and the express fiat of the constitution is that all commissions issued under the authority of the State shall be signed by the Governor, and sealed with the great seal of the State, and countersigned by the Secretary of State. The purpose of the constitution is that the warrant of all persons professing to represent the authority of the State shall be in the form indicated, and none other. The authority to appoint to an

office, or to delegate the exercise of the State's power, contemplates conformity to this section of the constitution, in making the appointment; and this section makes it the duty of the officers named whenever the power of appointing is exercised, to see that the commission or written evidence of the appointment is signed and authenticated as therein directed.

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In the absence of legislation by Congress providing the form in which the appointment of a Senator shall be authenticated, it is unnecessary to discuss the power of Congress to legislate upon the subject. If it has such power, its deprivation of it is no reason why the State cannot exercise it. The Senate has as much power to enquire into the legality of the appointment of a Senator by the executive power of a State, as into that of the election of one by a legislature. If it has not, any appointee can take his seat in the Senate upon the assumption that the Governor has appointed him and given him evidence of the appointment satisfactory to executive discretion. In all cases of any alleged executive appointment a primary question for the Senate is: Has the executive authority of the State made an appointment? Its validity as an executive appointment cannot be investigated until it is satisfactorily shown that there has been an appointment in fact by the executive. Under the Constitution and laws of the United States and of this State there is no known mode of evidencing or proving that an appointment of a United States Senator, or any other officer, has been made by the executive of this State, except, or unless and until, a commission has been duly signed, sealed and countersigned in accordance with the above quoted provision of our organic law, sec. 14, Art. IV., Constitution. . . . . .

In the absence of any provision in the Constitution or statutes of the United States, when the Governor of this State wishes to appoint a senator the only legal way of evidencing his act so as to command the recognition of it by the United States Senate as his official act, is to comply with the formula which the people of the State have in our constitution declared to be the proper form for exercising the executive power of appointing to office. Any appointment of a Senator not thus signed, sealed and countersigned is not authenticated in the manner in which our organic law, the only law regulating the subject, provides, and is not entitled to recognition by the Senate of the United States as a commission or appointment as United States Senator from the State of Florida, or its executive authority acting for the State. Assuming that

Congress has the authority to prescribe how such an appointment should be authenticated, until it does so the only reasonable conclusion is, that this executive act of the State government shall be evidenced in the manner provided by State law in such cases, and the only appointments or commission of Senators extended upon the proceedings of Congress within our reach, appear to have been signed by the Governor, sealed with the great seal of State, and attested or countersigned by the Secretary of State. We have been unable to find anything that suggests any other possible way of evidencing the executive act than that provided by provision of our own organic law, nor is there in the Constitution of the United States anything that prevents the State from regulating the evidence of this official act, at least until Congress shall act in the premises. The Governor, as the representative of the State, and the chief executive power, whose duty it is to see that the laws are enforced, is seeking to have an act done by him as her chief magistrate, authenticated in the only manner that it can be done to command recognition of it as done by him, and in our judgment he is, as her representative, entitled to have it done, unless there is in the nature of the act required of the Secretary of State something involving the exercise of official discretion.

It is in our judgment clearly the official duty of the Secretary to affix the seal of the state to the appointment, and to countersign or attest the same as evidencing the official act of the executive authority of the State in appointing a Senator in the Congress of the United States, and this duty is one involving no official discretion or judgment on his part.

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The duty devolved upon the Secretary of State in the case before us is merely to authenticate the commission signed and presented to him by the admitted rightful executive of the State. It is purely ministerial, and involves no exercise of discretion. There is from the very nature of the duty no place in it for the exercise of judgment. It involves nothing but affixing the seal and signing officially. It is entirely impossible for anyone to infer, from, or to find implied in, the simple duty of authenticating this evidence of an appointment of an office known to exist, and which, under certain circumstances, the executive of the State has authority to fill, the further duty or the power to question the legality of the exercise of the authority to appoint. If such duty or power of enquiry exists at all, then it covers every question as to the legality of the appointment that can be made. It extends not only to the

question of whether or not there is a vacancy, but also the appointee's qualifications as to age, residence or citizenship. If it exists at all, then the power conferred by the Constitution of the United States upon the executive of a State to appoint a Senator is not subject simply to the exclusive jurisdiction of the Senate as to the election or appointment and qualifications of its members, but to another jurisdiction, which is the judgment of the Secretary of State, and has the power to deny to the Governor the right of the constitutional evidence that he has made an appointment. If this power obtains in the case of an appointment of a Senator, it, arising as it must and alone can from the mere duty to authenticate a commission, exists also in the case of every justice of the peace, county commissioner, or other county officer, and of every State officer of whom under any contingency the Governor may have the power to make an appointment. In so far as the existence of the power is concerned there is no possible distinction in the several cases. To say that it would not be exercised, is no answer, but is an assumption of the existence of the power. Knowledge as to when, or by whom the power, if its exercise is recognized, will be used or renounced, is not a subject for our consideration.

In authenticating the executive appointment of a Senator, the Secretary of State in nowise commits himself to the legality of such act. The Governor is not responsible to the Secretary, nor the Secretary to him. If the act is illegal, the authentication of the Secretary is the evidence of its consummation; it proves what the Governor has done, but it does not involve the Secretary in responsibility for it. The Secretary's certificate to the transcript of the legislative proceedings furnished Mr. Call is official evidence of what those proceedings in fact were, and nothing more, and in nowise implies any opinion of his as to the regularity or legality of such proceedings, and the same is true, no less nor any more, of his authentication of the executive act in question. Nor does the appointment, though duly authenticated, have any effect upon the legality of Mr. Call's election, or towards creating any vacancy which does not otherwise exist. If an award of the writ would have any such effect, we would, and upon the plainest principles should, refuse to award it, and for the reason that Mr. Call is not before the court, nor is Mr. Davidson, and *mandamus* is not the remedy for settling a conflict for an office, even where the right to decide such a contest is in the court, which is not the case here. *People* v. *Farquer, supra; People* v. *Mayor, etc., of New York,* 3

Johns. Cases, 79; *State ex rel. Vienna* v. *Hyams*, 12 La. Ann. 719, cited in 17 La. Ann. 163.

. . . . . .

7th. Upon the case made by the pleadings, our conclusion is: that the peremptory writ should be awarded but, in view of the character of the parties, we will suspend until Monday next any formal order in the premises, further than one adjudging the return of the respondent insufficient and sustaining the demurrer thereto.

There is no vacancy at the expiration of the term fixed by law of an officer who is by law to hold over until his successor qualifies. Such an officer holds de jure until the qualification of his successor. See State v. Bulkley, 61 Conn. 287, *infra*.

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4. Power to Fill Vacancies.

FRITTS V. KUHL.

Supreme Court of New Jersey. February, 1889.

51 New Jersey Law, 191.

VAN SYCKEL, J. The facts which have occasioned this litigation are as follows:

On the 15th of February, 1888, a vacancy occurred in the office of president judge of the Hunterdon Pleas by the death of Mr. Sanderson. At the time of his death the senate was in session, and remained in session until the 30th day of March, 1888.

On the 1st day of March, 1888, the governor nominated the defendant, Richard S. Kuhl, to the office of president judge of the Hunterdon Pleas, to fill the said vacancy. The senate held the nomination until the 20th of March, and then refused to consent to it. No other nomination to this office was made by the governor to the senate during its session. In the meantime the chief justice, under a statute passed in February, 1888, appointed Judge Bartine, of the Somerset Pleas, to preside in Hunterdon and perform the duties of president judge of Hunterdon Pleas. On the 7th of April, 1888, during the recess of the legislature, and while Judge Bartine was presiding in Hunterdon, the governor appointed the defendant to fill the vacancy occasioned by the death of Judge Sanderson.

The information is filed to determine whether the governor had the power, during the recess of the legislature, to fill vacancy such as existed in this case.

Paragraph 1, section 2, article 7, of our constitution provides as follows: "Justices of the Supreme Court, chancellor, judges of the Court of Errors and Appeals, and judges of the Inferior Court of Common Pleas, shall be nominated by the governor and appointed by him, with the advice and consent of the senate."

Paragraph 12, of article 5, provides that "when a vacancy happens during the recess of the legislature in any office which is to be filled by the governor and senate, or by the legislature in joint meeting, the governor shall fill such vacancy, and the commission shall expire at the end of the next session of the legislature, unless a successor shall be sooner appointed."

If, therefore, within the meaning of this paragraph of the state constitution "this vacancy happened during the recess of the legislature," it was the duty of the governor to fill it. . . . . .

In order, therefore, to ascertain its true meaning, in accordance with the recognized rules of interpretation, we must seek for the reason and spirit of it, having regard to the effects and consequences of the construction adopted, and the source from which the language employed was derived. Was it intended merely to prevent those offices from remaining vacant, which become so during the recess of the legislature by some casualty, or was it to prevent any of the enumerated offices from remaining vacant during the recess of the senate, without regard to when or how the vacancy occurred?

The latter clause of section 2, article 2, of the federal constitution, adopted in 1787, provides that "the president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session."

. . . . . .

During the administration of President Monroe, in 1823, the question arose whether he had the power to fill, during the recess of the senate, a vacancy which had begun during the preceding session of the senate. During that session the president had made a nomination which the senate refused to confirm, and then adjourned, leaving the office unfilled.

Mr. Wirt, then attorney general, advised the president that he had power to fill the vacancy. In his opinion, he says:

"Had this vacancy first occurred during the recess of the sen-

ate, no doubt would have arisen as to the president's power to fill it. The doubt arises from the circumstances of its having first occurred during the session of the senate. But the expression used by the Constitution is 'happen.' 'All vacancies that may happen during the recess of the Senate.' The most natural sense of this term is, 'to chance—to fall out—to take place by accident.' But the expression seems not perfectly clear. It may mean, 'happen to take place;' this is 'to originate;' under which sense the President would not have the power to fill the vacancy. It may, also, without violence to the sense, mean 'happen to exist,' under which sense the President would have the right to fill it by his temporary commission. Which of these two senses is to be preferred?

"The first seems to be most accordant with the letter of the Constitution; the second most accordant with its reason and spirit. The meaning of the Constitution seems to me to result in this: that the President alone cannot make a permanent appointment to those offices; that to render the appointment permanent, it must receive the consent of the Senate; but that, whensoever a vacancy shall exist which the public interests require to be immediately filled, and in filling which the advice and consent of the Senate cannot be immediately asked, because of the recess, the President shall have the power of filling it by an appointment to continue only until the Senate shall have passed upon it; or, in the language of the Constitution, till the end of the next session. . . . . In reason, it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate, or during their recess, it equally requires to be filled. The Constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act."

. . . . . .

In 1885, Attorney General Cushing, referring to the opinions of his predecessors in office, says:

"They have thoroughly demonstrated and conclusively established, as a doctrine of administrative law, that the expression of the Constitution, 'all vacancies that may happen,' signifies 'all vacancies that may happen to exist in the recess,' or 'when there happen to be any vacancies in the recess.' And they concur in the general statement, that howsoever a vacancy happens to exist, if it exist it may be filled by temporary appointment of the President. They all agree that it is the true spirit of the Constitution to have the offices, which Congress indicates to be needful by creat-

ing them, filled, though provisionally, rather than remain vacant or force a special call of the Senate." *Vol.* 7 *of Opinions*, p. 187.

. . . . . .

Ten years later, Justice Woods, of the United States Supreme Court, sitting in the Georgia Circuit, refused to concur in the opinion of Judge Cadwalader. *Farrow's Case*, 3 Fed. Rep. 112.

And Attorney General Devens, in 1880, after an elaborate discussion of the subject, concluded that the opinions of his predecessors, and the practice under them, had settled the construction of the Constitution, that appointments might rightly be made through the vacancy first began during the session of the Senate, and he declared that the contrary view of Judge Cadwalader could not be considered of great authority or weight against these opinions, and an administrative usage which commenced as early as the time of President Monroe, and in reference to which such usage has been invariable. *Vol.* 16 *of Opinions*, p. 522.

All these opinions are based upon the idea that the power involves the performance of a duty, intended for the public good, and necessary for the effective administration of the government, and they discard the notion that the point of time at which the vacancy occurs has anything to do with the power of the President to make a provisional appointment.

. . . . . .

The first Constitution of this State contained no express provision for filling vacancies in State offices, which might exist during the recess of the Legislature. In 1802, in *State* v. *Parkhurst*, 4 Halst. 528, the question was submitted to this court, whether an appointment to the office of clerk of Essex county, made by Governor Bloomfield during the recess of the Legislature, to fill a vacancy which existed in that office, was a constitutional exercise of his power.

The Constitution provided that the office of county clerk should be filled by the Legislature in joint meeting, and the Supreme Court therefore denied the power of the executive. Chief Justice Kirkpatrick dissented, on the ground that by the eighth section of the Constitution the Governor was vested with the supreme executive power, and was thereby charged with the duty of filling all such vacancies during the recess of the Legislature. In this dissenting opinion the Court of Errors afterwards unanimously concurred. 4 Halst. 537, note.

Thus it appears that when the framers of our Constitution of 1844 were assembled to consider the question of providing for the temporary filling, during the recess of the Senate, of vacancies existing in those offices which were to be permanently filled by the Governor, with the advice and consent of the Senate, or by the Legislature in joint meeting, they had in view the fact that the power had been denied, and they wisely made express provision for it in the fundamental law.

That they carefully considered the language which should be used in incorporating into the new Constitution an express provision for the temporary filling of vacancies in State offices during the recess of the Legislature, cannot be doubted. Instead of attempting to formulate for themselves a clause which would express their purpose, they prudently adopted the language of that clause of the Federal Constitution which authorizes the President to fill vacancies which happen during the recess of the Senate.

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The question, therefore, which confronts us is far different from that submitted to Attorney General Wirt and that passed upon by Judge Cadwalader.

. . . . . .

It is a safe rule of construction that when the convention, in framing the organic law of the State, thought proper to borrow provisions from the Constitutions of other States, which provisions had already received a judicial construction, they adopted them in view of such construction and acquiesced in its correctness. *People* v. *Coleman*, 4 Cal. 48.

In 1844, there had been no judicial exposition of this language of the Federal Constitution, but the reason which underlies the decisions in the cases cited make them applicable to the case before us.

In *State* v. *Kelsey*, 15 Vroom 1, this court declared that "a statute of uncertain meaning, which has been enforced in a certain sense for a long series of years by the different departments of government, will be judicially construed in that sense." This rule has been held to apply, with equal reason, in expounding the Constitution. *Briscoe* v. *Bank*, 11 Pet. 257, 318; *Moers* v. *Reading*, 21 Penna. St. 188.

Not only has this language acquired, by long established usage, a well settled meaning in the exercise by the President of his functions under the Federal Constitution, but it has received a like in-

terpretation in the conduct of our State government since 1875, without challenge, until this information was filed.

. . . . . .

The argument of those who deny the power, that it will tend to deprive the Senate of their just participation in appointments to office, is not of controlling force. It is not logical to argue from an abuse of power to a negation of it. Every authority, however indispensable, may be the subject of abuse. Undoubtedly the Governor may abuse this, as he may any other power entrusted to him, but the argument is equally cogent, that the Senate may arbitrarily refuse to consent to every nomination made by the Governor, and leave him powerless to execute the laws, unless he will accede to its demands. The consequences likely to flow from a denial of the Governor's power are much more to be deprecated than can result from conceding it.

The power of the Governor to appoint, where vacancies happen during the recess, extends not only to those offices filled by the Governor with the advice of the Senate, but also to those filled by the Legislature in joint meeting. The failure to fill the latter during the session can result from no breach of duty on the part of the executive. The power of the Governor, after the adjournment, to fill a vacancy, must be the same in both cases; if he cannot appoint in the one case, he cannot in the other; and this shows that it was not intended to put a limitation upon his power to guard against an abuse of his prerogative.

The possibility of abuse loses its significance the moment we distinguish between power and duty. The question of power alone can be considered by this court. For willful breach of official duty, or abuse of the power committed to him, the Governor is, like other civil officers, liable to impeachment, and must answer to the tribunal erected under the Constitution for the trial of such cases. Even though the Governor should be guilty of a breach of duty in refusing to send any nomination at all to the Senate during its session, it would be none the less within his power, and his duty after the adjournment, to fill the vacancy. In that case, the impeachable conduct would be his willful refusal to advise with the Senate, and not his act in filling the vacancy in the after recess.

. . . . . .

The making of the appointment in controversy was, in my judgment, a legal exercise by the Governor of his constitutional prerogative. The propriety of the appointment of Mr. Kuhl, after his rejection by the Senate, was a question for the Governor alone.

This court has no right to instruct the Governor as to matters which involve his duty only and not his power. We cannot know the circumstances which influenced his action, and must presume that he acted rightly.

There should be judgment for the respondent.

See note to State v. Bulkley, 61 Conn. 287 *infra.*

PEOPLE EX REL. SWEET V. WARD.

Supreme Court of California. May, 1895.

107 California Reports 236.

HENSHAW, J. Appeal from the judgment.

The facts, about which there is no controversy, are as follows: Ward, the appellant, was duly elected district attorney of San Diego county for the term commencing January 2, 1893. He qualified and entered upon the discharge of the duties of the office. At the general election in November, 1894, and during Ward's term and incumbency, William Darby was elected to succeed him pursuant to section 60 of the County Government Act of 1893. Darby duly qualified upon November 24th, and on December 15 of the same year died.

Section 60 of the County Government Act of 1891 provided that "all elective county officers . . . . . shall be elected at the general election to be held in November, 1892, and every two years thereafter . . . . . and shall take effect at 12 o'clock meridian of the first Monday after the first day of January next succeeding their election. . . . . All officers elected under the provisions of this act shall hold office until their successors are elected or appointed and qualified."

Such was the law when Ward was elected and when the questions in litigation arose.

After Darby's death, and on the 2nd day of January, 1895, the board of supervisors, as then constituted, appointed Ward to fill the vacancy caused by the death of Darby, and to be district attorney "for the term of office to be taken at 12 M. on the seventh day of January, 1895;" and upon the day of his appointment Ward qualified in due form as the appointee to succeed Darby.

At 3 o'clock P. M. on January 7th, 1895, the personnel of the board having been changed by the outgoing of two old and the incoming of two new supervisors at noon of that day, the board as then constituted declared a vacancy to exist in the office of district attorney, and appointed the relator to fill the same during the term for which Darby had been elected, and Sweet in due course qualified. Sweet made demand upon Ward for the office on January 10, 1895, and, upon Ward's refusal to surrender it, this action was brought to determine their conflicting claims.

By appellant it is contended: 1. That no vacancy in the office resulted from the death of Darby; 2. That if a vacancy did result it occurred *eo instanti* upon the death of Darby, and it was then the right and duty of the board of supervisors to fill the vacancy, which they duly did by the appointment of himself. Under his first contention he asserts a right to hold until his successor is elected or appointed and qualified. Under his second contention his right is based upon the theory of a vacancy, and his appointment to serve out Darby's term.

1. It is not to be questioned but that if Darby had lived, and at noon of the seventh day of January, 1895, had demanded the office of Ward, he would have been entitled to enter it, and Ward's term would thus and then have ceased and determined. But was a demand by Darby necessary to determine Ward's tenure? The answer is found in the language of the statute. Ward, by section 60 of the act quoted, and by section 879 of the Political Code, was entitled to hold absolutely until noon of January 7th, and contingently after that date, if no successor had been elected or appointed and qualified. He had a fixed tenure and a contingent term. (*People* v. *Edwards*, 93 Cal. 153.) The election and qualification of Darby as Ward's successor (and not a demand by him for the office) *ipso facto* cut off Ward's contingent term, and limited him to the absolute period, that is, until noon of January 7th. (*State* v. *Bemenderfer*, 96 Ind. 374; *State* v. *Seay*, 64 Mo. 89; 27 Am. Rep. 206; *Commonwealth* v. *Hanley*, 9 Pa. St. 513; *Gosman* v. *State*, 10 Ind. 206; *People* v. *Supervisors of Barnett Township*, 100 Ill. 332; Mechem on Public Offices, sec. 401; Throop on Public Offices, sec. 329.) The word "successor" is used in our statutes, as in the books, in the twofold sense of the one entitled to succeed, and the one who has in fact succeeded. It is here employed in the former acceptation.

. . . . . .

The Legislature may provide that certain acts, happenings, or

events shall create a vacancy in law, while its greatest wisdom cannot prevent the occurrence of vacancies in fact. The death of the incumbent creates a vacancy as a matter of course, and without any expression from the Legislature upon the question. But when, for example, the Legislature declares that the office of a sheriff shall become vacant when he stands committed for sixty days for not paying over money received by him (Pol. Code, sec. 4186), such a vacancy may be described as a vacancy in law.

So here, the Legislature having in effect provided that Ward's term upon the election and qualification of Darby came to an end at noon of January 7, 1895, a vacancy in law resulted when Darby's death prevented his succession. It is true the office would not be without an incumbent, since Ward, as *locum tenens*, could hold until the supervisors by appropriate action appointed to the vacancy, but, as has been said, Ward's incumbency gave him no right to a fixed and definite tenure.

. . . . . .

This vacancy . . . . . is in the nature of an interregnum. It arose when upon noon of January 7, 1895, Darby by death was not able to take his office. (*French* v. *County of Santa Clara*, 69 Cal. 519; *People* v. *Taylor*, 57 Cal. 622.) The expiration of Ward's term alone did not create the vacancy. It was the election and qualification of his successor, and the expiration of the term, which worked the result. It is another instance of a vacancy contemplated by statute, but not expressed in section 996. (*People* v. *Mizner*, 7 Cal. 519-23.)

2. The vacancy which occurred having arisen at noon of January 7th, it remains to be considered whether the action of the board of supervisors upon January 2d was legal or illegal, and as this is determined, so will the claim of appellant stand or fall.

The board, then, undertook to fill, not an existing vacancy, but one soon to exist; not, however, a contingent or possible vacancy. but one which in the nature of things was certain to arise, though at a future date, and at a time when in legal contemplation, and in fact, a different board would be in control of the county's affairs. Briefly, the act of the board was to make an appointment to take effect, and to fill a vacancy to arise, in the term of its successor.

We are not, therefore, here concerned with the question of the power to appoint to fill an anticipated vacancy by the person or body which, as constituted, is authorized to fill the vacancy when it occurs, but solely with the question of an appointment made to

fill a prospective vacancy, which will arise at a time when there will have been a change in the appointing power.

Upon the election and qualification of Darby his *right* to the office for the term commencing at noon of January 7th vested immediately, and Ward's contingent right to an additional term was cut off. Upon the divesture of that right by death it existed in no one, and there was no revivor of Ward's contingent right to an extended term.

The power of the board of supervisors in dealing with such matters is drawn from section 25, subdivision 21, of the County Government Act of 1891, and it is limited to the filling of vacancies. That power could properly be exercised only upon an existing vacancy. The board could by its action neither create a vacancy, nor by anticipation fill one, which was to a rise *in futuro* during the term of its successor.

Mechem lays down the rule in the following language, and, so far as our investigations have extended, its soundness is not opposed by any dissenting voice: "The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to offices expiring after their power to appoint has itself expired." (Mechem on Public Offices, sec. 133.) This is the language of *Ivy* v. *Lusk*, 11 La. Ann. 486, while to like effect are the cases of *State* v. *Meehan*, 45 N. J. L. 189, and *State* v. *Love*, 39 N. J. L. 14.

We conclude, therefore: 1. That a vacancy arose in the office of district attorney by reason of the election, qualification, and death of Darby; 2. That this vacancy existed at and after noon of the seventh day of January, 1895, and not before; 3. That the attempt of the first board of supervisors to fill the vacancy upon January 2nd was in excess of its power and void; 4. That the vacancy was properly filled by the existing board at 3 o'clock P. M. of January 7, 1895.

Wherefore, it follows that the judgment appealed from is affirmed.

TEMPLE, J., MCFARLAND, J., VAN FLEET, J., GAROUTTE, J., HARRISON, J., and BEATTY, C. J., concurred.

III. Acceptance of Office and Qualification.

1. Obligation to Accept.

PEOPLE EX REL. INSURANCE COMPANY V. WILLIAMS.

Supreme Court of Illinois. 1893.

145 Ill. 573.

This is an original proceeding for *mandamus* to compel the respondent, Thomas C. Williams, to accept, assume and take upon himself and execute the office of town clerk of the town of Mount Morris, in the county of Ogle, in this State, to take and subscribe the oath of office, and to file bond, as required by law.

. . . . . .

Mr. Justice Shope delivered the opinion of the Court:

The principal question presented is, whether *mandamus* will lie to compel acceptance of a municipal office by one who, possessing the requisite qualifications, has been duly elected or appointed to the same.

It is stated by text writers that no case has arisen in this country involving this precise question (Merrill on Mandamus, sec. 145; Dillon on Mun. Cor., sec. 162), and in the researches of counsel, and our own examination, none have been found. There are, however, a number of cases where analogous questions, involving the same principle, have been elaborately discussed and determined in the State and Federal courts. Very many English cases are found, in which it has been held that it was a common law offense to refuse to serve in a public office, to which one has been elected or appointed under competent authority: and that *mandamus* will lie in such case to compel the taking of the official oath, and entering upon the discharge of the public duty.

. . . . . .

The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of and to supply the defects of the common law prior to the fourth year of James I. (excepting certain statutes), and which are of a general nature and not local to that kingdom, are, by our statutes, made the rule of decision until repealed by the Legislature. Thereby the great body of the English common law became, as far as applicable, in force in this State.

It is held in numerous English cases, that by the common law it

was deemed the duty of every person having the requisite qualification, elected or appointed to a public municipal office, to accept the same, and that a refusal to accept such office was punishable at common law.

. . . . . .

. . . . . Citation from cases will not be necessary; so uniformly has the doctrine been maintained, that there is a legal duty to accept an office when duly elected or appointed, in a public or municipal corporation, at common law, and that *mandamus* is an appropriate remedy in cases of refusal, that it is accepted by all the text writers.

. . . . . .

It follows, necessarily, that if to refuse the office is a common law offense, and punishable as such, that a legal duty attaches to the person to take upon himself the office, which may now be enforced by *mandamus*.

While offices of this class, in England, were accepted as a burden, they have not been generally so regarded in this country. Under our system of local government, even the smallest offices are generally accepted, either because they are supposed to lead to those which bring higher honors and greater emoluments, or because of a sense of duty. To this fact, and perhaps to the prevalent but mistaken idea, that one holding a public office may resign at will, may be attributed the want of decisions in this country upon the precise question at issue.

. . . . . .

The reason assigned in *Rex.* v. *Larwood*, 1 Salk, 168, for the public duty is, "that the King hath an interest in every subject and a right to his service, and that no man can be exempt from the office of sheriff but by act of Parliament or letters patent." Under our form of government, the principle applies with even greater force than under a monarchy. In a republic the power rests in the people, to be expressed only in the forms of law. And if the duty, representative of the common welfare, is disregarded, society may suffer great inconvenience and loss, before, through the methods of legislation, the evil can be corrected. Upon a refusal of officers to perform their functions, effective government, *pro tanto*, ceases. All citizens owe the duty of aiding in carrying on the civil departments of government. In civilized and enlightened society men are not absolutely free. The burden of government must be borne as a contribution by the citizen in return for the protection afforded. The sovereign, subject only to self-imposed restrictions

and limitations, may, in right of eminent domain, take the property of the citizen for public use. He is required to serve on juries, to attend as witness, and without compensation, is required to join with *posse comitatus* at the command of the representative of the sovereign power. He may be required to do military service at the will of the sovereign power. These are examples where private right and convenience must yield to the public welfare and necessity. It is essential to the public welfare, necessary to the preservation of the government, that public affairs be properly administered; and for this purpose civil officers are chosen, and their duties prescribed by law. A political organization must necessarily be defective, which provides no adequate means to compel the observance of the obvious duty of the citizen, chosen to office, to enter upon and discharge the public duty imposed by its laws, and necessary to the exercise of the functions of government.

It is admitted by the demurrer, that the respondent was legally appointed town clerk of the town of Mount Morris. The office is connected with, and necessary to, the levy of taxes to carry on the municipal concerns of the town and administration of its local jurisdiction. It is shown, that there was a public necessity, as well as that relators had a private interest in the performance of the duties of that office. No election had been held in the town since the annual town meeting of 1891. Numerous persons had been appointed to said office, but it remained vacant, and the duties consequently, undischarged. It is admitted by the demurrer, also, that claims against the town, in favor of the relator, to a large amount, had been audited by the board of town auditors of said town, and allowed, and certificate thereof duly made, as provided by law, but that the same could not be delivered to or filed with the town clerk, because of such vacancy in said office, nor could the aggregate amount therefor be certified to the county clerk of said county, to be levied and collected as other town taxes. It is conceded, that the respondent was eligible to the office; that a vacancy therein existed; that he was appointed conformably to the law, and duly notified thereof.

. . . . . .

It is insisted, that the Legislature having provided a penalty for the refusal to accept the office, that that remedy is exclusive, and that a payment of the penalty imposed was intended to be in lieu of the service. We cannot concur in this view. The purpose of imposing the penalty, was to enforce the acceptance of the office and performance of its duties, and the statute cannot be construed as

intending that the person chosen should be discharged from the duty by payment of the penalty, and thereby the purposes of the creation of the office frustrated, and the public duty remain unperformed. Authorities *supra*. It is to be presumed that, had the Legislature intended that the payment of the fine should be in lieu of the service, they would have so enacted, and not having done so, the duty remains, notwithstanding, the imposition of the fine or penalty. High, Ext. L. Rem., 334, and *supra*.

. . . . . .

We are of opinion that the respondent ought to be required to accept the office of town clerk of said town, to which he has been duly and legally appointed, to take and file the oath as such town clerk, as provided by law, and to discharge the duties of said office, and a peremptory writ of *mandamus* is awarded accordingly.

Peremptory writ awarded.

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2. How Acceptance of Office is Manifested.

STATE EX REL. CARPENTER V. THE SUPERVISORS OF THE TOWN OF BELOIT.

Supreme Court of Wisconsin. June, 1866.

21 Wisconsin 282.

Application for a *mandamus*.

A rule having been granted in this cause, requiring the supervisors of the town of Beloit to show cause why they should not be compelled to levy a certain tax, *Charles Peck*, as chairman of said board, answered that at the annual town meeting in April, 1865. one Ruble and one Parish were elected supervisors of said town; that each of them neglected and refused to qualify, and declined and refused to accept the office; that neither of them had since said election ever qualified, accepted or entered upon the discharge of the duties of said office, or acted or assumed to act as such supervisor: that at the time of the service of said rule to show cause, said *Peck* was and from thence continued to be, the only supervisor of said town; and that he had no authority to levy any tax.

Demurrer to the answer.

DIXON, C. J. It is of the very essence of this proceeding that

there be some officer or officers in being, having the power and whose duty it is to perform the act. If there be no such officers, it is obvious that the writ cannot go, nor the mandate of the court be enforced. It is conceded that the chairman alone cannot levy the taxes; but it is claimed that the other two persons elected, but who neglected to qualify, became supervisors *de facto* by virtue of such election, and can be compelled to act as such in the performance of the duty enjoined by the writ. To this point the case of *Coles County* v. *Allison*, 23 Ill. 437, is cited. That case holds no more than this: that the acts of officers *de facto* are valid as respects the public and third persons having an interest in them, and that they cannot be collaterally impeached. The trustees there elected at the second election, though irregularly perhaps, were held to be officers *de facto*, inasmuch as they had, in the language of the report, "qualified, and ever since exercised the functions of their office." That was sufficient, in the opinion of the court, to show a valid organization of the town. In this case, however, the other two supervisors elected not only failed to qualify, but it does not appear that they have ever assumed to act as such in any manner whatever. The statute declares that every office shall become vacant on the refusal or neglect of the incumbent to take his oath of office, or to give or renew his official bond, or to deposit such oath or bond within the time prescribed by law. R. S. ch. 14, sec. 2. The other two persons elected are, therefore, neither supervisors *de jure* nor *de facto;* and the offices are vacant. . . . . .

By the Court.—Peremptory writ refused.

As to effect in vacating an office of the failure of the one entitled to such an office to file his bond within the time designated by statute see Chicago v. Gage, 95 Ill. 593; Stephens v. Crawford, 1 Ga. 574; People v. Johr, 22 Mich. 461, *infra.*

SPEED V. COMMON COUNCIL OF DETROIT.

Supreme Court of Michigan. October, 1893.

97 Michigan 198.

MONTGOMERY, J. On September 30 last, the relator filed his petition in this court for *mandamus* to compel the respondent to approve a bond which relator had filed with respondent, as city counselor. An order to show cause was issued, and respondent's answer is now filed.

It appears from the petition that the relator is a resident and elector of the city of Detroit, and that on the 16th of January, 1891, he was appointed city counselor by the common council of said city, on the nomination of the mayor; that he took the oath of office and filed his official bond, which was approved by the common council, and thereupon entered upon the duties of said office; that at the session of 1893 the Legislature of this State passed an act entitled "An act supplemental to the charter of the city of Detroit, and to provide for a law department in said city," the second section of which provides:

"The city counselor shall be a practicing attorney, appointed as provided in this act. He shall have practiced his profession for at least five years, and shall devote his whole time to the duties of his office. He shall be appointed by the mayor on or before the third Tuesday in June, for the term of three years from the 1st day of July next succeeding his appointment."

That this act was approved by the Governor on June 1 and took immediate effect; that at this time the relator was in the office of city counselor for the term ending July 1, 1893; that on July 15, 1893, the mayor of the city executed and delivered to the relator an appointment to the office of city counselor.

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That the relator filed this appointment in the office of the city clerk on the same day it was made, together with his oath of office; that the act under which the appointment was made provides in section three that the city counselor shall, before entering upon the duties of his office, execute a bond to the city of Detroit in the sum of $5,000, with such sureties as the common council shall approve, conditioned for the faithful performance of the duties of his office; that, on July 18, the relator executed the bond required by the act, with two sureties, in the penal sum of $5,000; that upon the bond were endorsed the affidavits of the sureties, in which they severally deposed that they were worth in unincumbered property, not exempt from execution under the laws of the State, each the sum of $5,000 after the payment of his just debts, claims, and liabilities; that the bond was endorsed by the certificate of the city attorney; that it was correct in form and execution; that this bond was filed on the day of its execution in the office of the city clerk, and by him transmitted to the common council, which referred the same to the committee on ways and means, and that this committee, on July 25, 1893, reported to the common council in favor of the approval of the bond, which report was laid upon the

table; that on July 18, 1893, the mayor communicated to the council that in pursuance of the act of June 1, 1893, he had appointed the relator as city counselor for the term commencing July 1, 1893; that, at a meeting of the council held July 25, it received from the mayor the following communication:

To the Honorable, The Common Council:

"*Gentlemen:* In compliance with the act supplemental to the charter of the city of Detroit, providing for a law department, passed by the Legislature in 1893, and approved June 1, 1893, I notified your honorable body last Tuesday of the appointment of John J. Speed as city counselor of the city of Detroit under said act. Since said appointment said Speed has, by public utterance, placed the matters of the greatest importance to the city, now in litigation, in jeopardy, by, it seems to me, most unwise and uncalled-for interviews in the public press. His attitude, as thus fairly conveyed, seems hostile to the best interests of the community. While admitting the ultimate success of the present litigation, he questions the policy of the city, the motives of the officials, and advocates the interests of the defendants. In order to protect the people and maintain their rights thus far obtained in the courts, I have this day revoked the appointment of John J. Speed as city counselor, and hereby give you notice thereof, and request your honorable body not to accept any bonds from said Speed, as required by the act aforesaid, for such office, as the same is now vacant. Very respectfully,

"H. S. PINGREE, Mayor."

That the report of the committee for the approval of the relator's bond was thereupon laid upon the table; and that on July 29, at a special session of the council, the mayor, by a communication then made, informed the council that he had appointed John B. Corliss city counselor, and requested confirmation thereof, and on motion this appointment was confirmed by the council.

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The contention on the part of the respondent is:

1. That, under section 8 of chapter 7 of the charter of the city of Detroit, all appointments of the mayor are conditional, and not absolute, and that this section of the charter was not repealed by the act of 1893.

2. That, even if this appointment had been absolute, yet the relator, on July 25, had not qualified so as to entitle himself to the office; therefore his appointment was inchoate, and was well revoked by the mayor.

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1. The present charter of the city of Detroit was passed in 1883.

and repealed all acts or parts of acts in conflict therewith. Act No. 326, Local Acts, of 1883, p. 579.

. . . . . .

We are, however, led to the conclusion that, under the act of 1893, the exclusive power of appointment to the office of city counselor is vested in the mayor. The appointment was duly made and filed, and when so made and filed was beyond the power of the mayor to recall. It was not inchoate, as claimed, but was absolute, and upon the relator's complying with the provisions of the act by the filing of his oath of office, and the approval of his bond by the common council, he was entitled to the possession of the office.

It is well settled that when the appointing power has once exercised its functions it has no more control.

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In *Mosher* v. *Stowell*, 9 Abb. N. C. 456, it appears that, by the charter of the city of Elmira, the common council was vested with the power of appointing a city chamberlain, whose term of office was fixed at three years. At a regular meeting of the council held March 11, 1879, a resolution was adopted and entered upon the minutes, purporting to appoint the relator to said office in place of the previous incumbent, whose term of office had expired. On the same day the relator took the oath of office, and filed the same in the proper office. He presented his bond to the common council at a meeting held March 14, and on April 8 the bond was approved. The charter provided that the mayor should sign all appointments made by the council. There was no express proof that the appointment of the relator was or was not signed by the mayor. At a meeting of the council held on March 15 the council adopted a resolution purporting to rescind the appointment of relator, and to appoint respondent. On that day respondent took the oath of office and filed it with the city clerk, and on the same day the council approved his bond, and respondent entered into the office, and continued to hold it. It was held that the signature of the mayor was not necessary to complete the appointment, and the mayor could not defeat the action of the council by withholding his signature.

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The subsequent resolutions, purporting to rescind the appointment of relator and appointing respondent, were held to be nullities.

In *United States* v. *Bradley*, 10 Pet. 343, it was held that the

appointment of a paymaster is complete when made by the President and confirmed by the Senate; that the giving of a bond for the faithful performance of his duties is a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as paymaster. The approval of the bond is not essential to the vesting of the title of the office in relator. *United States* v. *Bradley, supra; Coogan* v. *Barbour,* 53 Conn. 76; *United States* v. *Le Baron,* 19 How. 73; *Culver* v. *Armstrong,* 77 Mich. 194; *Bennett* v. *Benfield,* 80 Id. 265.

2. There was, therefore, no vacancy in the office of city counselor at the time the mayor attempted to appoint Mr. Corliss. The appointment of relator was complete and absolute, and a vacancy had not occurred, within the provisions of section 649, How. Stat. The relator had not refused nor neglected to take his oath of office, or to give his official bond, or to deposit the same in the manner and within the time prescribed by law. The council could not arbitrarily refuse to approve the bond, and the excuse here set up by the return does not amount to a justification for the refusal or neglect to approve. It is apparent upon the face of the return that the action taken was not founded upon the form or conditions of the bond, or the insufficiency of the sureties, but upon the action of the mayor in his attempt to set aside the appointment of relator, and to appoint Mr. Corliss.

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4. The contention of counsel for respondent that Mr. Corliss is now a *de facto* officer, and everyone is bound to recognize him as city counselor, might have some force if the official acts of Mr. Corliss were being questioned; but the only contention in the present proceeding is that it was the duty of the common council to approve the relator's bond when it was presented, and that it should now be compelled to do so. It does not matter here whether Mr. Corliss be regarded as a *de facto* officer or a mere intruder; the fact remains that the relator was duly appointed, and his appointment could not be revoked by the mayor, and the council had no power of removal in the summary way attempted. It is the duty, therefore, of the council to approve relator's bond, even though Mr. Corliss be *de facto* city counselor. The vacancy, if one existed, was made by reason of the expiration of the term of relator under his former appointment, and was filled by his appointment by the mayor. It is true that it is conceded by the relator, in commencing *quo warranto* proceedings, that Mr. Corliss is in the office, but he claims that he is there wrongfully, and that the coun-

cil should approve his (relator's) bond. It was the duty of the council, under the circumstances, to approve the bond.

5. Mr. Corliss's right to the office, if he have any, will be considered in the *quo warranto* proceedings, when heard; but the council cannot shield itself behind the claim made to the office by Mr. Corliss, and refuse to perform a plain duty imposed upon it by the charter.

6. We think there is sufficient evidence, and uncontradicted, upon this record, to warrant us in holding that the bond was proper in form, and that the sureties thereon justified their responsibility as required by the charter.

7. The claim made that *mandamus* is not the proper remedy has no force. It is asked to compel the performance of a purely ministerial act, and, no sufficient reason being given to the contrary, the writ must issue as prayed. The discussion of the power of the mayor and of the council, and the construction of the several provisions of the charter, become necessary to a determination of the relator's right to have his bond approved.

The other justices concurred.

But see Ex parte Harris, 52 Ala. 87, holding that the approval of an official bond may not be enforced by mandamus.

CHAPTER III.

DE FACTO OFFICERS

I. INTRUDERS.

STATE EX REL. VAN AMRINGE V. TAYLOR.

Supreme Court of North Carolina. February, 1891.
108 N. C. 196.

MERRIMON, C. J. The ascertainment of the popular will or desire of the electors under the mere semblance of an election unauthorized by law is wholly without legal force or effect, because such election has no legal sanction. In settled, well-regulated government, the voice of electors must be expressed and ascertained in an orderly way prescribed by law. It is this that gives order, certainty, integrity of character, dignity, direction and authority of government to the expression of the popular will. An election without the sanction of the law expresses simply the voice of disorder, confusion and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of government. Hence, if a person assume to be a registrar of elections and four others likewise assume to be judges of election, and purport and undertake to hold an election on election day, in an election precinct, and take and count the votes cast at it honestly, such action and proceeding would be no election, nor would it be accepted and treated as such by authority. An essential element of a valid election is that it shall be held by lawful authority, substantially as prescribed by law. It is not sufficient that it be simply conducted honestly, it must as well have legal sanction. The statutory provisions and regulations in respect to public elections in this State must be observed and prevail, certainly in their substance. Otherwise, the election will be void and so treated. Therefore, the contention that if the election in question was simply conducted fairly and honestly it was valid, is unfounded.

The court instructed the jury that Thomas was registrar *de facto* if they believed either of the two aspects of the evidence, and

the election would hence be valid. As to this there was no exception. But the court said further: "If you find from the evidence that Cowan continued to act as registrar and employed Thomas as clerk to assist him, and that Thomas, whilst sustaining this relation to Cowan, fraudulently obtained possession of the books on the second Saturday preceding the election with a promise to return them, and assumed to act as registrar, he was an intruder and had no authority and could perform no lawful official act, and in consequence the election held by him and his appointees was void, and your answer to the issue should be No." This is made the principal ground of assignment of error.

The instruction thus complained of must be taken in connection with the whole of the instructions given, and in view of all the evidence pertinent. The evidence tended to prove that one Cowan was duly appointed to be *registrar;* that he accepted the office, and acted as and claimed to be such, continuously, until the day of the election; that he did not resign, or profess to resign; that he did not appoint, or undertake to appoint Thomas to be registrar; that he was employed and treated simply as his clerk; that Thomas fraudulently got the registration books from the registrar under the false promise to return the same; that he did not do so, but on the day of election expressly refused to surrender the registration books, and then assumed to be registrar, acted as such, and undertook and purported to appoint three judges of election, who, with a judge regularly appointed, co-operated with him in holding the election. The evidence fully warranted the instruction, if it was correct in point of law.

It is difficult to define, in precise terms, what constitutes an officer *de facto* in all cases. Indeed, what may constitute such officer in one case, may not in another. A variety of facts and circumstances, tending to show authority of the person claiming and exercising it, go to constitute such officer, and upon grounds of necessity and public policy, to give his acts validity as to the public and persons taking benefit of his official acts. There must be something, some consideration, evidence, facts, circumstances or conditions that reasonably lead those persons who, in the course of the administration and discharge of the duties of the office, must, in some way, have relations or business with it, to recognize and treat the person claiming to be officer as the lawful incumbent.

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. . . . A mere intruder or usurper is not ordinarily, but may become, an officer *de facto* in some cases. This can happen only

by the continued exercise of the office by him and the acquiescence therein by the public authorities and the public for such length of time as to afford to citizens generally a strong presumption that he had been duly appointed. But when without *color* of authority he simply assumes to act, to exercise authority as an officer, and the public know the fact, or reasonably ought to know that he is an usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest could not impart to them validity and efficiency. . . . .

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The citizen is justly chargeable with *laches,* does that which is his own wrong and wrong to the public, when he recognizes, tolerates, encourages and sustains a mere usurper, one whom he knows, or ought, under the circumstances, to know to be such. In such cases, neither justice, necessity nor public policy requires that the acts of the usurper shall be upheld as valid for any purpose. Indeed, these things, the spirit and purpose of government strongly suggest the contrary.

When, therefore, Thomas obtained from the registrar (Cowan) the registration books, fraudulently, under promise to return the same and assumed to act as registrar, he was simply an intruder, and had no authority and could perform no lawful act as such, and the election which he and the supposed judges, his appointees, cooperating with him, held, was void. The instruction of the court to the jury excepted to was pertinent, and had reference to the evidence going to prove that Thomas so fraudulently obtained the registration books and assumed to act as registrar, and the jury must have found that he did. The jury found that he was not registrar *de facto* by reason of *color* of appointment. They found also that he was a fraudulent intruder, but they did not find—nor was there evidence to warrant such finding—that he was an intruder under such circumstances and conditions as to constitute him registrar *de facto.* The evidence went to show that he had been the clerk of the registrar; that he did not claim to be or act as registrar until the day of the election; that he had no such reputation; that the electors had not so recognized him; that no public authority had so recognized him at any time; and that, on the morning of the day of the election, in the presence of electors, the lawful registrar had publicly demanded that he surrender to him the registration books to the end that he and the lawfully appointed judges of election might hold the election ac-

cording to law, and he refused to do so. The evidence went to prove, and the jury found, that Thomas was a naked intruder, with no attending circumstances and conditions that rendered him registrar *de facto*. The electors had notice that Cowan was the lawful registrar; that he had been duly appointed; that he acted as such. There was no notice that he had resigned his office, nor had he done so. On the contrary, on the morning of the election he claimed his right and authority to hold the election. This was notice—important notice—that Thomas was an intruder, and the election was not such in contemplation of law. The electors ought not to have recognized the intruder. They did so in their own wrong. They ought to have demanded and required that the registrar and lawful judges of election hold the election according to law. It was their duty to themselves and to the public to have done so, and, failing in this for any cause, they ought not to have gone through an empty form that had no legal effect. They lost their votes and their voice, in part, through their own *laches*.

The issue of fact submitted to the jury was broad and comprehensive. It embraced the whole of the matter at issue. The relator could readily, as he did, put in all pertinent evidence and avail himself of it before the jury. He was not necessarily prejudiced by it, nor can we see, nor does it at all appear, that he was. The other exceptions are without merit.

Judgment affirmed.

II. Who are de facto Officers.

STATE V. CARROLL.

Supreme Court of Errors of Connecticut. 1871.
38 Conn. 449.

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The prisoner moved to erase the case from the docket for the following reasons:

First, because the court before which he was tried was an irregular and pretended court, not holden by H. Lynde Harrison, Esq., the only judge of said court, but by one William H. Morse, who was never elected judge of the same by the General Assembly.

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Butler, C. J.

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If the principle that an officer who exercises the duties of an office under and pursuant to the provisions of an unconstitutional law is as to the public and third persons an officer *de facto*, be sound, Mr. Morse was such officer, and the judgment is valid. The principle was questioned in the argument of that case, and in the dissenting opinion, mainly on two grounds, viz.: First, on the ground that there must be in order to constitute an officer *de facto*, color of election or appointment *by the only body which had power to elect or appoint;* and second, on the ground that a law manifestly unconstitutional has not even the semblance of authority, and cannot confer any color whatever.

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First, then, as to the point that in order to constitute an officer *de facto* there must be color of appointment or election by the only body which had the power to appoint or elect. No authority was cited for it except an expression used by Judge Hinman in *Douglass* v. *Wickwire,* 19 Conn. 492, and quoted in *State* v. *Brennan's Liquors,* 25 Conn. 283. The claim was that the expression was used as a definition of that which constitutes an officer *de facto.* The expression was this: "It is enough if the officer acts under color of an election or appointment, by the only body which has the power to make it."

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2. But if it were admitted that such a definition was intended, it would be entitled to no respect. None such is to be found anywhere, with or without the qualification '*prima facie*,' in any of the more than two hundred cases which have been decided in England and this country, in respect to this matter. Such a definition is directly in conflict with the principles which underlie the *de facto* doctrine, and to a strong and irresistible current of decision in England and in this country, commencing with the earliest case in the Year Books, and extending to the present time.

. . . . . .

The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. It was seen, as was said, that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title, and these became settled principles in the law. But to protect those who dealt with such officers when apparent incumbents of offices under such apparent circumstances of reputation

or color as would lead men to suppose they were legal officers, the law validated their acts as to the public and third persons, on the ground that, as to them, although not officers *de jure*, they were officers in fact, whose acts public policy required should be considered valid. It was not because of any quality or character *conferred upon the officer*, or attached to him by reason of any defective election or appointment, but a name or character given to his acts by the law, for the purpose of validating them. When, therefore, in civil cases, the public or third persons had knowledge that the officer was not an officer *de jure*, the reason for validating the acts to which they submitted, or which they invoked, failed, and the law no longer protected them.

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It should be remembered that among the earliest cases there was a distinct class entirely independent of color derived from any known appointment or election, where the law said to the public as a rule of policy: "If you find a man executing the duties of an office, under such circumstances of continuance, reputation, or otherwise, as reasonably authorize the presumption that he is the officer he assumes to be, you may submit to or employ him without taking the trouble to inquire into his title, and the law will hold his acts valid as to you, holding him to be, so far forth, an officer *de facto*. If he has color of appointment or election, and yet is not a good officer for want of authority in the appointing power, or irregularity in exercising it, or because there was another lawful officer entitled to the office, or because the incumbent was ineligible, or had not qualified as the law required, or his term had expired, your case is made stronger by the color, but that kind of color is not essential to your protection, for you are not bound to inquire to see that it exists." So the law has spoken in England from the first introduction of the doctrine, as the cases abundantly show. So it speaks there now. So it spoke in this country until that deceptive definition was introduced from Strange, and so it has since spoken, and the definition been modified accordingly, whenever a case has arisen where the policy on which the law was founded had made it necessary that it should so speak, to save the public from mischief, or individuals from loss.

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These cases seem to me sufficient to show that even our definition of a *de facto* officer, as introduced by Judge Hosmer from Strange, is imperfect, and tends to obscure the true character of the doctrine. They are all cases of usurpation, without election or ap-

pointment for the terms during which the acts were done, or color from that source, and sustainable only on the ground of reputation and presumption.

Doubtless color of election or appointment from competent authority is necessary for the protection of an officer *de facto*, when he is assailed directly because of his acts. And there are other distinctions which bear upon the relation of an officer, as that he cannot collect his fees, or claim any rights incident to his office, without showing himself to be an officer *de jure*, but which do not bear upon the case in hand. I will not pursue that branch of the subject any farther than to say, that we shall see hereafter that an officer will be protected in relation to all acts done under or pursuant to public law, before it is judicially determined to be unconstitutional.

A definition sufficiently accurate and comprehensive to cover the whole ground must, I think, be substantially as follows: An officer *de facto* is one whose acts though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised,

First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.

Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.

Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the appointing or electing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.

Anything less comprehensive and discriminating will, I think, be imperfect and deceptive as a definition.

We come now to the second and more important proposition advanced in *Brown* v. *O'Connell*, to the effect that "a law passed by the legislature cannot have color of authority, or the semblance of authority, unless it appear *prima facie* to be law and that it

cannot so appear if it is manifestly repugnant to the constitution: but that a law of doubtful constitutionality may be presumed to be constitutional until it is judicially decided to be otherwise; but that a law manifestly unconstitutional is void upon its face, and unable to confer the appearance of color of authority." . . . .

The doctrine that a law of doubtful constitutionality may be presumed to be constitutional until judicially decided otherwise, and that a law manifestly unconstitutional cannot be so presumed, has no existence as applicable to the citizen. There is a rule of judicial construction adopted by the courts to the effect that unless the law is clearly unconstitutional, or if it is of doubtful constitutionality, they will not declare it unconstitutional. But that is a rule of *purely judicial construction*, and can have no other application. . . . . It has never been claimed, to my knowledge, before, that the citizen may adopt that rule of judicial construction, and treat a law, if manifestly unconstitutional, as without the semblance or color of authority. It is an instance of the misapplication of an unquestioned rule.

If, then, the law of the legislature, which creates an office and provides an officer to perform its duties, must have the force of law until set aside as unconstitutional by the courts, it would be absurd to say that an officer so provided had no color of authority. But on this question we need not reason. There is an irresistible current of authority in this country which determines it.

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The question whether the act under which the justice held the city court was constitutional or not, we do not think proper under the circumstances to decide. As he was clearly a judge *de facto*, a decision of the question is not necessary, and it has not been, and should not be, the practice of this court to decide upon the constitutionality of an act of the General Assembly unnecessarily, nor without full and exhaustive argument. Such argument we have not heard in this case—the question being scarcely alluded to on behalf of the state. Moreover, there is a cotemporaneous exposition and practice in relation to the subject peculiar to this state, and other existing laws, which render the question one of grave importance.

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Looking, then, to the general practice which existed in relation to the manner of filling the courts in cases of vacancy or disability, from an early period in the history of the state, and to the cotemporaneous and continued adoption of the practice under the con-

stitution; to the fact that a decision of the question may reach all the courts of the state, and that it has not been fully argued; and the fact that the decision of the question is unnecessary in the case, for that the justice must be holden to have been a judge *de facto*, and his judgment valid in any event, we deem it our duty to leave the question undecided.

In this opinion Carpenter, Foster, and Seymour, Js., concurred. Park, J., concurred in the result.

OLIVER V. THE MAYOR, ETC.

Supreme Court of New Jersey. November, 1899.

63 N. J. L. 634.

NIXON, J. On September 19th, 1898, the board of street and water commissioners of Jersey City passed "An ordinance granting to the Greenville and Hudson Railway Company permission to cross Communipaw Avenue with its tracks at grade and regulating such crossing." The ordinance was vetoed by the mayor but was passed again, notwithstanding the objections of the mayor, on the 3rd of October, 1898.

The defendant in error, a resident and taxpayer of Jersey City, was allowed a writ of *certiorari*, and a judgment of the Supreme Court was afterwards obtained setting aside the ordinance, and this writ of error brings that judgment before us for review.

. . . . . .

. . . . the ordinance was assailed principally upon the ground that it was not legally adopted. The board of street and water commissioners is the governing body of Jersey City, and it enacts all the local laws of that city respecting streets and water. It consists of five members, and the ordinances passed are subject to the mayor's approval, and if vetoed by him may be again passed, notwithstanding his objections, by four votes of the board. *Gen. Stat.* p. 465. The ordinance in question was adopted at a regular meeting held September 19th, 1898, there being four votes for and one against it. It was vetoed by the mayor on September 28th, and finally passed over his veto on the 3rd of October, 1898, receiving the same number of votes. But the contention is that one of them was not such as could give efficacy to the ordinance. It

was cast by Robert G. Smith, who had been mustered into the United States service as colonel of the Fourth Regiment of New Jersey Volunteers, on July 18, 1898. The statute creating the board of street and water commissioners provides (*Gen. Stat.* p. 465) that "no commissioner shall accept or hold any other place of public trust or emolument within the elective franchise, nor any appointment to public office, unless he shall first resign his said office, and if he shall accept such other office without having resigned his office of such commissioner, upon his acceptance of such place of appointment his office shall thereupon become vacant."

While there has not been furnished the best proof that Smith actually accepted the office of colonel, yet in the absence of any rebuttal we shall hold, as did the court below, that it is sufficient and that he did accept such office.

It is also insisted by the plaintiffs in error that Smith should be made a party in this proceeding, but we think that where an action is instituted the object of which is only to determine the validity of the act or thing done by an officer, and not involving his personal integrity or want of good faith, the officer himself is not a necessary party. No allegation or proof of bad faith on the part of anyone appears in the record.

The question at issue is thus narrowed down to the efficacy of Smith's vote in the adoption of the ordinance. Without his vote it could not have been passed over the veto; neither could it without every other vote it received; and it is not strictly accurate to say that his vote had any more potency than any other. After his appointment Smith continued to discharge the duties of his office as commissioner and was present and voted when the ordinance was adopted, as the official minutes show. It would therefore be a pure solecism to call the office vacant at that time except in the strictly legal sense of having no occupant with a *de jure* title. The acts done by Smith in respect to the adoption of the ordinance were neither more nor less than he would have done had the Fourth Regiment never been organized. It is therefore manifest that the words of the statute (*Gen. Stat.* p. 465) already quoted, declaring that when a commissioner accepts another office his former office shall become "vacant," cannot mean, in a situation like this, that it is corporeally vacant, for the person lawfully elected to fill it remained in possession discharging its duties. Mere words in a statute cannot alone make an office unoccupied which in fact is occupied. The legal meaning of the words in such circumstances is that the office has no occupant who holds

by a good title in law, and that the appointing power may at once be exercised to fill it, or if it is an elective office, the people may elect, and no adjudication is required to declare the vacancy, although the newly-appointed or elected officer may find it necessary afterwards to resort to *quo warranto* proceedings to obtain actual possession of the office. Under the old rule of the common law, that upon accepting another and incompatible office the first became vacant and the occupant refused to abandon it, a writ of *quo warranto* to determine the question of incompatibility was the remedy; and where the common law has been superseded by statutes declaring a vacancy under like circumstances and the occupant remains, a similar course must be pursued to obtain possession or such other steps as the facts may warrant. There are familiar precedents in our own state which illustrate the rules here stated. In *Clark* v. *Ennis,* 16 Vroom 69-72, the court said: "It is clear, both upon reason and authority, that a statute declaring an office vacant for some act or omission of the incumbent after he enters upon his duties, does not execute itself." Also, *Clawson* v. *Thompson,* Spenc. 689; also, *State* v. *Parkhurst,* 4 Halst. 427, with a difference only in the attitude of the parties. The governor having appointed Parkhurst in Ogden's absence, the new officer took possession and Ogden became the prosecutor to regain possession. Had Ogden remained the title of the case would have been *State* v. *Ogden,* with the same result. The same practice prevails in other states, and the rule is clearly stated in *State* v. *Jones,* 19 Ind. 356, where it is said: "Where it appears, *prima facie,* that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority authorized to fill such vacancy, supposing the office to be vacant, may proceed before procuring a judicial declaration of the vacancy and appoint or elect, according to the forms of law, a person to fill such office; but if, when such person attempts to take possession of the office, he is resisted by the pervious incumbent, he will be compelled to try the right and oust the incumbent, or fail to oust him, in some mode prescribed by law."

Smith, then, being in the office under color of a legal title, *ab origine,* and no other person claiming a right to it, was he a commissioner *de facto?* Lord Ellenborough, in 1805, in *Rex* v. *Bedford Level,* 6 East 356, said: "An officer *de facto* is one who has a reputation of being an officer, who assumes to be and yet is not a good officer in point of law." This definition has never been questioned, and all those given by the text-writers since are

little more than variations of this one. Tested by this ancient or any modern definition, Smith must be held to have been such an officer when this ordinance was passed. He certainly had color of title and reputation, for the legal voters of Jersey City elected him in the spring of 1898 a member of the board for a term of three years, and he duly qualified as such and entered upon his duties with full knowledge and acquiescence of the public. He had never resigned. The board had not been abolished and his term had not expired. It has been urged and the record shows that he had been absent from several meetings of the board, but it cannot be held that a vacant chair in itself makes a vacant office. Such a rule would work bad results in most of our legislative and governing bodies. The question in a case like this is not whether a member has been frequently absent but whether he was present and voted when the ordinance was adopted. He did not assert a right which any other person claimed, or perform any official duties that anyone else pretended to have any right to perform in his stead, but only those duties which belonged to the office he was elected to fill and which the law contemplated should be done and the public expected him to do when they elected him, for the law creating the board provides that the judgment and wisdom of five commissioners should determine the questions that arise in the passage of ordinances concerning the streets. The board also recognized his membership. He participated in their proceedings, his name was called and vote recorded in the adoption of ordinances, and if not present his absence was duly noted in the official minutes. With all these facts and circumstances appearing in the record, and undisputed, we must hold that Smith was a commissioner *de facto*. This conclusion is in accord, we think, with the decisions in this state and elsewhere on this subject.

. . . . . .

There are no facts in this case to justify us in relaxing the wise and ancient rule so deeply rooted in public policy, that the acts of *de facto* officers holding under color of title originally lawful, when acting in good faith, will protect third persons and the public in their dealings with them, whether serving alone or as members of a governing or legislative body.

The ordinance in question is one of interest to all of the people of Jersey City, and they are the public whose rights are affected by its validity. The third persons whose rights are involved are the more than four hundred residents and taxpayers in the neighborhood where it is to go into effect, who petitioned the board to

pass it, claiming that it will be of benefit to them, and another third party, corporate, is the railway company to which the right is granted to lay the tracks that will, it is alleged, greatly add to the convenience of a system of public traffic extending from Communipaw cove to the great lakes.

The learned counsel for the prosecutor have invited our attention to many cases, but we fail to discover their applicability to the facts in the record before us. There can be no difference of opinion as to all such as hold that when a person filling one office accepts another and incompatible one, his *de jure* title to the first ceases, and his successor may at once be appointed or elected, or that the acts of an officer whose term has ended and his successor had qualified and taken possession in his stead are void, or that the official acts of a city council done after the term for which it was elected has expired are illegal; also the acts of a board after it has been abolished by the legislature, or that the acts of one who has not, and never had, any color of title to the office are void.

But this case rests entirely upon the question whether Smith when he voted for the ordinance in dispute was an officer *de facto*, and his acts, therefore, valid as far as the rights of third parties and the public are concerned. We hold that he was such an officer, and that the ordinance is valid. This conclusion results in a reversal of the judgment of the Supreme Court setting aside the ordinance.

For affirmance—GUMMERE, 1.

For reversal—THE CHIEF JUSTICE, DIXON, GARRISON, LUDLOW, BOGERT, NIXON, HENDRICKSON, ADAMS, VREDENBURGH, 9.

One who is ineligible for an office but becomes an incumbent thereof is a *de facto* officer. Attorney General v. Marston, 66 N. H. 485, *infra*. So also is one who holds over after the expiration of his term. Romero v. United States, 24 Ct. of Cl. 441.

NOFIRE V. UNITED STATES.

Supreme Court of the United States. October, 1896.
164 United States, 657.

Mr. Justice BREWER delivered the opinion of the court.

Plaintiffs in error were indicted in the Circuit Court of the United States for the Western District of Arkansas for the murder of Fred. Rutherford "at the Cherokee Nation in the Indian country," on December 15, 1895. They were tried in May, 1896,

found guilty by the jury, and, on June 12, the verdict having been sustained, they were sentenced to be hanged.

The principal question, and the only one we deem it necessary to notice, is as to the jurisdiction of the court. The defendants were full-blooded Cherokee Indians. The indictment charged that Rutherford was "a white man and not an Indian," but testimony was offered for the purpose of showing that although a white man he had been adopted into the Cherokee Nation, which, if proved, would oust the Federal court of jurisdiction within the rule laid down in *Alberty* v. *United States*, 162 U. S. 499. In that case it was held that the courts of the Nation have jurisdiction over offenses committed by one Indian upon the person of another, and this includes, by virtue of the statutes, both Indians by birth and Indians by adoption. The Cherokee Nation claimed jurisdiction over the defendants. This claim was denied by the Circuit Court, which held that the evidence of Rutherford's adoption by the Nation was not sufficient, and that therefore the United States court had jurisdiction of the offense. An amendment in 1866 to section 5 of article 3 of the Cherokee constitution gives the following definition of citizenship: "All native-born Cherokees, all Indians and whites legally members of the Nation by adoption, ... and their descendants, who reside within the limits of the Cherokee Nation, shall be taken and be deemed to be citizens of the Cherokee Nation." (Laws of Cherokee Nation, 1892, p. 33.) The Cherokee statutes make it clear that all white men legally married to Cherokee women and residing within the Nation are adopted citizens. (Sections 659, 660, 661, 662, 663, 666 and 667, Laws of the Cherokee Nation, 1892, pp. 329, and following.) Section 659 requires that before such marriage shall be solemnized the parties shall obtain a license from one of the district clerks. Sections 660 and 661 provide that one applying for such license shall present to the clerk a certificate of good moral character, signed by at least ten respectable citizens of the Cherokee Nation, and shall also take an oath of allegiance. On October 4, 1894, Rutherford was married to Mrs. Betsy Holt, a Cherokee woman. The marriage license, with the certificate of the minister of the performance of the ceremony, and the indorsement of the record of the certificate, is as follows:

"MARRIAGE LICENSE.

"Cherokee Nation, Tahlequah District.

"To any person legally authorized, greeting:

You are hereby authorized to join in the holy bonds of matri-

mony and celebrate the rites and ceremonies of marriage between Mr. Fred. Rutherford, a citizen of the United States, and Miss Betsy Holt, a citizen of the Cherokee Nation, and you are required to return this license to me for record within thirty days from the celebration of such marriage, with a certificate of the same appended thereto and signed by you.

"Given under my hand and seal of office this the 28th day of August, 1894.

(Seal of Tahlequah district, Cherokee Nation.)

"R. M. DENNENBERG,

"*Deputy Clerk, Tahlequah District.*"

. . . . . .

The performance of the marriage ceremony was also proved by the minister a regularly ordained Presbyterian preacher. T. W. Triplett was the clerk of the Tahlequah district at the date of this certificate. R. M. Dennenberg was his deputy, but at the time of the issue of the license both the clerk and his deputy were absent, and the signature of the deputy was signed by John C. Dennenberg, his son. The clerk, the deputy and his son, each testified that the latter was authorized to sign the name of the clerk or the deputy in the absence of either, and that the business of the office was largely transacted by this young man, although not a regularly appointed deputy. He made quarterly reports, fixed up records and issued scrip, and his action in these respects was recognized by the clerk and the Nation as valid. No petition, as required by the statute, was found among the papers of the office, but there was testimony that all the papers of the office had been destroyed by fire since the date of the marriage license, and the younger Dennenberg testified that a petition was presented containing the names of ten citizens; that he could not remember the names, but, at the time, made inquiry and satisfied himself that they were all respectable Cherokee citizens. There was testimony also that Rutherford offered to vote at an election subsequent to his marriage; that his vote was challenged, and on inquiry it was ascertained that he was a Cherokee citizen, and his vote received. Upon these facts the question is presented whether Rutherford was a Cherokee citizen by adoption. The Circuit Court held that the evidence was insufficient to show that fact, and that therefore that court had jurisdiction.

With this conclusion we are unable to concur. The fact that an official marriage license was issued carries with it a presumption

that all statutory prerequisites thereto had been complied with. . . . . .

It is true that the younger Dennenberg, who signed the marriage license, was neither clerk nor deputy, but he was an officer *de facto,* if not *de jure.* He was permitted by the clerk and the deputy to sign their names; he was the only person in charge of the office; he transacted the business of the office, and his acts in their behalf and in the discharge of the duties of the office were recognized by them and also by the Cherokee Nation as valid. Under those circumstances his acts must be taken as official acts, and the license which he issued as of full legal force. As to third parties, at least he was an officer *de facto;* and if an officer *de facto,* the same validity and the same presumptions attached to his actions as to those of an officer *de jure.*

. . . The Cherokee Nation not only recognized the acts of young Dennenberg as the acts of the clerk, but since the death of Rutherword it has asserted its jurisdiction over the Cherokees who did the killing—a jurisdiction which is conditioned upon the fact that the party killed was a Cherokee citizen.

It appears, therefore, that Rutherford sought to become a citizen, took all the steps he supposed necessary therefor, considered himself a citizen, and that the Cherokee Nation in his lifetime recognized him as a citizen and still asserts his citizenship. Under those circumstances, we think it must be adjudged that he was a citizen by adoption, and consequently the jurisdiction over the offense charged herein is, by the laws of the United States and treaties with the Cherokee Nation, vested in the courts of that Nation.

The judgment of the Circuit Court must be reversed and the case remanded with instructions to surrender the defendants to the duly constituted authorities of the Cherokee Nation.

JAMES McCAHON V. THE COMM'RS OF LEAVENWORTH CO.

Supreme Court of Kansas. July, 1871.
8 Kansas, 437.

VALENTINE, J. Only one question requires our special consideration in this case, and that is, whether John T. McWhirt and certain other persons acting with him were on the 16th of March, 1869, *de facto* the board of county commissioners of the county of Leavenworth. That they were not *de jure* said board, and that there was another set of men who were *de jure* said board, is conceded by both parties; but it is claimed by the plaintiff in error that said McWhirt and his associates were *de facto* said board.

On the 16th of March, 1869, the plaintiff presented to said McWhirt and his associates an account against said county for professional services as an attorney-at-law, and said McWhirt and his associates allowed it. The plaintiff then sued the county upon this allowance and not upon the original account. The counsel for the defendants claims that McWhirt and his associates were not the board of county commissioners either *de jure* or *de facto*.

Were said McWhirt and his associates *de facto* the board of county commissioners of the county of Leavenworth? The court below finds that "they were neither the county commissioners *de jure* nor *de facto*, but were usurpers, and had no authority to audit and allow the plaintiff's account;" and this finding, we think, is in harmony with the other findings. A *de facto* officer must be in fact the officer. He must be in the actual possession of the office, and have the same under his actual control. *De facto* means, in law, as well as elsewhere, "of fact, from, arising out of, or founded in fact; in fact, in deed; in point of fact; actually; really." Burrell's Law Dict. If the officer *de jure* is in possession of the office; if the officer *de jure* is also the officer *de facto*, then no other person can be an officer *de facto* for that office. Two persons cannot be officers *de facto* for the same office at the same time; *Boardman* v. *Holliday*, 10 Paige, 223, 232; *Morgan* v. *Quackenbush*, 22 Barb. 72, 80. And where an office has been created to be held by one person only, two or more persons cannot hold the same as tenants in common. In the present case the regular and *de jure* board of county commissioners were elected in November, 1867. They would, under the law, hold their offices until the second Monday of January, 1870: Art. 11, § 3, Const.; Comp. Laws.

500, § 40; Gen. Stat., 418, § 58; *Leavenworth Co.* v. *The State ex rel. Latta,* 5 Kas., 688. They had been in the actual possession, and had the exclusive control of their respective offices for more than a year before McWhirt and his associates claimed to be county commissioners. There is nothing in the record of this case that shows that any one of the offices had become vacant, nothing that shows that any one of such officers had died, resigned, removed from his district, or from the county, or had been removed from his office. There is nothing that shows that such officers or any one of them were ever ousted from office, or that they ever in any manner abandoned the same; but they continued to be *de facto* as well as *de jure* county commissioners down to the time of the trial of this case; hence there was no room for McWhirt and his associates to become *de facto* county commissioners. Such officers were already filled by officers *de facto* and *de jure.*

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McWhirt and his associates never got possession of said offices. If they had been legally elected they should have taken possession of said offices on January 11th, 1869. (Gen. Stat., 418, § 58.) But they did not attempt to take possession of the same until February 2d, 1869. Then they met without any authority whatever, it not being the time for the board to meet, and being just one day after the regular board had adjourned, and declared themselves to be the board of county commissioners of Leavenworth county: but no other person, board, or officer, except the plaintiff, ever recognized them as such. We are now speaking of what the record in this case shows. Possibly the facts may have been different. It is true, *they "met together in the clerk's office,"* and the clerk "kept a *record* of their proceedings;" but the clerk never attested such record with his signature, nor with the seal of the county, as he does the record of the proceedings of the legally constituted board of county commissioners. (Gen. Stat., 263, § 43.) It seems the clerk did not choose to recognize them as a board of county commissioners. There is nothing to show that this record which was kept by the clerk was kept in the books of the county. It does not seem from the record in this case that McWhirt and his associates ever got possession of any of the property of the county, or of any of the records, books, papers, the seal, or of anything else belonging to the county or connected in any manner with the office of county commissioners. The clerk ceased to keep any record of their proceedings eight days before the said allowance of the said plaintiff's account, and no record of any kind was ever made of

such allowance, and no county order was ever issued therefor. Under the circumstances of this case we do not think that McWhirt and his associates can be considered as county commissioners *de facto*. The judgment of the court below must therefore be affirmed.

KINGMAN, C. J., concurring.

BREWER, J., did not sit in the case.

STATE V. GARDNER.

Supreme Court of Ohio. 1896.

54 Ohio St. 24.

BRADBURY, J. At the September term of the court of common pleas of Summit county, Omar N. Gardner was indicted for offering a bribe to Joseph Hugill, a city commissioner of the city of Akron. The accused demurred to the indictment on the ground that the act of April 20, 1893, under which Hugill was performing the duties of his office, was unconstitutional and void. The demurrer was sustained and the defendant discharged. To this holding of the court the prosecuting attorney excepted, and . . . has brought the question to this court for review. Two questions are presented by the record: 1. Whether the act of April 20, 1893, which provides a municipal government for the city of Akron, is unconstitutional or not, and 2, if unconstitutional whether its constitutionality may be assailed in the collateral way, undertaken by the accused. The first question which logically arises, is the latter of the two; for if the accused should not be allowed to raise the question, in the way he attempted, it follows that the constitutionality of the act which created the office was not before the court. Whether an act of the general assembly creating an office and providing a method for filling it may be collaterally attacked, is a question of the utmost importance in the practical administration of governmental affairs. Different courts have decided the question differently. *Leach* v. *The People*, 122 Ill. 420; *Burts* v. *Winona & St. P. R. Co.*, 18 N. W. Rep. 285; *Coyle* v. *Commonwealth*, 104 Pa. St. 117; Mechem on Public Officers, sections 318, 327; Van Fleet on Collateral Attack, section

21, page 33; *Norton* v. *Shelby County,* 118 U. S. 425; *Hildreth* v. *McIntire,* 1 J. J. Marsh 206.

. . . . . .

If the official acts of officers, acting in an office created by an unconstitutional statute, should be regarded as falling within the principle that sustains the acts of *de facto* officers, until the statute has been held unconstitutional by competent judicial authority in a proceeding appropriate to that end, all difficulty vanishes. The opposite doctrine is based upon the assertion that there can be no *de facto* officer, unless there is a *de jure* office. That is a simple and summary way to dispose of this grave question. That there can be no *de jure* officer without a *de jure* office is a proposition to which all minds will, of course, assent. But that there can be no *de facto* officer without a *de jure* office, is disputable, if the phrase "*de facto* officer" includes one who in fact discharges the duties of a public office, recognized by the great body of the people and by virtue of a statute solemnly passed by the general assembly of the state, which may be unconstitutional. That there have been many officers who occupied and discharged the duties of offices created by laws that were afterwards held unconstitutional is a fact well known to every one. While in such occupancy innumerable official acts, affecting both public and private rights, may have been actually performed by them; the duration of the office may, and often does, extend through a series of years. In the case before us the act in question is one creating a municipal government for the city of Akron, and has been in force since its enactment in April, 1893; it superseded an act passed in the year 1891 for the government of that city, which latter act was subject to the same assault that was attempted to be made on the one under consideration. The existing government of the populous and thriving city of Youngstown, also rests upon the act now assailed. While that of the city of Springfield depends upon an act, at least as vulnerable to the same attack, as the act under consideration. The constitutionality of the governments of the cities of Springfield and Youngstown have not been assailed, even collaterally, and may continue unchallenged for many years. The officers who in these cities occupy offices created by the act upon which the city government rests, are daily discharging duties affecting the rights of the city, and the private rights of individuals. These officers are either usurpers or trespassers, or *de facto* officers; if the latter, the rights of the public, or of individuals who have submitted to their authority, or acquiesced in its exercises, would be unaffected

by a subsequent authoritative judicial declaration that the statute was unconstitutional; if they were usurpers merely, every official act would be a nullity, and interminable confusion possibly follow such a decision. Were such results to follow, the court might well pause before declaring unconstitutional an act establishing a city government, unless its constitutionality was challenged upon the threshold of its existence.

The common law in relation to *de facto* officers had its origin in England; it was there laid upon a foundation as broad as their necessities required. Such a thing as a written constitution controlling legislative action was unknown to their jurisprudence; whatever office parliament chose to create was a *de jure* office. In the states of the American Union, however, we find written constitutions, limiting the otherwise absolute power of the people to act through the legislative branch of the government. As a consequence of this peculiar feature of our government, a statute, regularly enacted by the legislative branch thereof, may, in express terms, create a public office, or it may authorize a municipal corporation to create one; an incumbent may be appointed in the mode prescribed by the statute, he may qualify, enter upon the discharge of the duties of the office, and continue to discharge those duties indefinitely—possibly for many years—during which he daily performs official acts affecting not only public rights, but private rights of the most sacred character. After all this has occurred the constitutionality of the statute is successfully challenged, and the statute declared void, and for the first time in the history of the common law its principles must be invoked to ascertain the status of the rights of persons, and of the public, that accrued before the law was declared void.

We think that principle of public policy, declared by the English courts three centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been legally appointed, is as applicable to the conditions now presented as they were to the conditions that then confronted the English judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has subsequently been declared unconstitutional, though we think that such officers might aptly be called "*de facto* officers." They actually performed official acts authorized by an act solemnly enacted by the law-making department of the government. Such a statute is presumed to be constitutional. *Railroad*

v. *Commissioners of Clinton County,* 1 Ohio St. 77. The unbroken current of authority supports this proposition.

Courts in the practical administration of justice should regard the substance of things and deal with conditions as they actually exist. Here are grave and important official acts actually performed by virtue of an office, created under the provisions of a statute regularly enacted by that branch of the government to which power to make laws has been delegated by the constitution; there is a clearly established legal presumption of its validity. The public in its organized capacity, as well as private citizens, has acquiesced in and submitted to their authority. Such circumstances, the majority of the court are of opinion, are sufficient to give such color to their title as to make them *de facto* officers; but whether they fall within the previously existing definition of such officers or not, their official acts thus performed fall within the protection of that principle of public policy which defends them against collateral attack, and that, therefore, the question of the constitutionality of the statute in question was not before the court of common pleas.

SPEAR, J. (concurring).

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It is not here assumed that there is not disagreement among authorities. There is. Perhaps, *Norton* v. *Shelby County,* 118 U. S. 425, is most relied on as sustaining the contrary doctrine. In that case the legislature of Tennessee had undertaken, by statute, to constitute for the county of Shelby a board of commissioners to be appointed by the governor, and clothe it with all the powers and duties then possessed by the quarterly court of the county, composed of the justices of the peace who had been elected by the people. This county court was one of the institutions of the state recognized in the constitution. County commissioners are wholly unknown to the constitution, and therefore, to the laws. There was no acquiescence by the justices or the people; on the contrary, there was immediate and continued public opposition, by suit and otherwise, on the part of justices and others until the final disposition of the case. Meantime, in the face of the opposition and the litigation, the board subscribed to stock and issued railroad bonds of the county to the amount of about $29,000, and the liability of the county on these bonds was the subject of the suit. It must be apparent at a glance that we have before us no such case. In that case there was, according to the holding of the supreme court of Tennessee, no power in the legislature to authorize the appoint-

ment of county commissioners with such powers, by any form of statute, while in our case the power to create a board of city commissioners for Akron is unquestioned, and, if the proper classification has been prescribed no one doubts that it is a board *de jure*. As against protest and objection from the start in the Tennessee case, we have, in our case, universal assent and acquiescence on the part of everybody for years. But it is insisted that the declarations of law given out by the court, irrespective of the judgment rendered, control this case. Do they? It is there said: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." It is not necessary to question the aptness of this language as applied to the Tennessee case, but when it is sought to apply it to the situation in this state, and to our case, we think it opposed by the better authorities and the better reason. All legislative authority is vested in our general assembly. That body enacts the laws. It is just as much its duty to observe the constitution as it is the duty of any other branch of the government. The presumption is, as declared in *Railroad* v. *Commissioners,* 1 Ohio St. 77, and nowhere disputed, that in the enactment of laws they heed that duty. To say, then, that a statute which, by all presumptions, is valid and constitutional until set aside as invalid by judicial authority, cannot, in the meantime, confer any right, impose any duty, afford any protection, but is as inoperative as though it had never been passed, is at least startling. To say that a statute which purports to create a constitutional office, duly enacted by our general assembly, and duly promulgated, enjoins no duty of respect or obedience by the people, and affords no corresponding right of protection, and that all who undertake to enforce its demands do so at their peril, and at the risk of being deemed trespassers and usurpers, in case it shall be finally decided to be unconstitutional, by a bare majority, perhaps, of the court of last resort, no matter what public necessities existed for its enforcement, nor what public approval and acquiescence there may have been, nor for how long a term of years, and no matter how many holdings of intermediate courts there may have been sustaining its constitutionality, is to invite riot, turmoil and chaos. It is not the law in Ohio.

If the people may reasonably be expected to have sufficient knowledge of the constitution so that when called upon to deal with one exercising the functions of an office they may intelligently

inquire far enough to ascertain whether the office be one which the constitution creates, or gives authority to the general assembly to create, it certainly is not reasonable to expect the people to be wise enough to determine for themselves, and at their peril, whether the general assembly, in its efforts to establish an office which it has the most unquestioned right to establish, has observed all the requirements of the constitution.

It is sought to dispose of this case by use of the phrase that there can be no officer *de facto* unless there is an office to fill. The proposition begs the question. The obvious answer is that there is an office to fill whenever our law-making power, exercising its authority to create a constitutional office, by a duly enacted and promulgated statute, ordains there shall be such office, and it remains an office until the act is repealed or held unconstitutional by a court of competent authority, in a proceeding to which the one holding the office is a party, who, in the meantime, his election or appointment being regular, and the public acquiescing in his discharge of the duties, is an officer whose title can be questioned only by the state itself.

. . . . . .

It seems to be conceded that, on grounds of public policy, one occupying an existing *de jure* office should be regarded an officer *de facto,* although his appointment thereto is pursuant to an unconstitutional statute. Does any reason exist why the same public policy will not require that one occupying, with general acceptance, an office which the general assembly has power to create, should likewise be judged an officer *de facto,* although in the exercise of the power by the assembly, constitutional requirements have not been observed? If any such reason does exist certain it is that none has been adduced, but instead the maxim that there can be no *de facto* officer unless there be a *de jure* office is invoked. Summed up in brief, the substantial ground of objection urged against the state's position is that it antagonizes well-known maxims of the law, and is illogical. Maxims, like definitions, have their uses; but it is not wise to rely absolutely on them, for they are often inexact. A discriminating writer has said: "Maxims are attractive because they seem to offer the conclusions of wisdom in a portable form, but legal principles are not capable of definition after the fashion of the exact sciences, because the law is not a science, in the scientific sense, and the attempt to express its principles in rules of mathematical precision misleads oftener than it enlightens." It may be added that maxims and aphorisms

are among the tritest, not to say the cheapest, weapons of legal contests. If one may annihilate an opponent's position by attacking it with a maxim, or a phrase, the conquest is easy, for the legal quiver is full of them. It is equally easy to assume, as proven, contested propositions, and from them advance with confidence to desired conclusions. This is logic, perhaps, but there are times when logic fails. The law is intended for practical use. By the act in question local governments are erected in the cities coming within the description, and the necessary officers are provided to carry on the government in those localities. On certain officers named is imposed the duty to put the law in operation by appointing the commissioners. As before stated the law is presumed to be constitutional. Should those officers be expected to go into an inquiry to demonstrate that they have no power to do what the statute directs them to do? At all events, they raise no question, but proceed with the duty, and fully equipped city governments result, which the community recognizes, and the property rights of the people, and public order as well, depend upon the acts of such commissioners in the performance of duties imposed by statute. And yet we are told that these proceedings, whenever questioned collaterally, are to be adjudged void, because the statute "creates no office, imposes no duty, confers no right, affords no protection, and is as inoperative as though it had never been passed." The mischiefs and troubles which would follow such a result are against reason, and are so apparent that no enumeration of them is needed.

It would seem plain that the proceedings to challenge such a legislative act should be a direct one to which the officer is a party, so that the judgment of the court may have the direct effect of settling the question permanently, and for the whole world, in such manner that it could not afterward be made the subject of judicial investigation.

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SHAUCK, J. (dissenting).

HARVEY V. PHILBRICK.

Supreme Court of New Jersey. November, 1886.

49 New Jersey Law, 374.

PARKER, J. The following facts appear in the written agreement of the counsel for the respective parties, viz.:

1. That the "borough commission of Ocean Beach was incorporated under the laws of the State of New Jersey, entitled 'An act for the formation of borough commissions,' approved March 7th, 1882, and the supplements thereto."

2. That an election for seven commissioners and other officers of said borough was held on May 12th, 1886, and at such election such officers were elected.

3. That at such election Frank P. Philbrick was elected collector of said borough commission.

4. That said Frank P. Philbrick is still collector of said borough commission.

5. That the collector is, by virtue of the laws of New Jersey, entitled "An act providing for additional powers and certain changes in the government of certain localities governed by commissioners," passed April 17th, 1884, the treasurer of said borough.

6. That said borough commission is justly indebted to David Harvey, Jr., the relator, in the sum of $53.15; and that at a meeting of the commissioners, held on May 6th, 1887, it was resolved by said commissioners that said bill be passed and that an order be drawn upon the said treasurer for the amount thereof.

7. That an order was drawn upon said treasurer, under said resolution, in proper form, and signed by the president and secretary of the commission, which order was given to the relator.

8. That the relator presented said order to Frank P. Philbrick, treasurer as aforesaid, and he refused to pay the same, alleging, as the only reason for such refusal, that the borough of Ocean Beach was not legally organized, the Borough act being unconstitutional.

9. That there were, at the time of the presentation of said order to the said Frank P. Philbrick, treasurer as aforesaid, and now are, sufficient funds in the hands of said treasurer to pay said order.

Under this state of facts the relator prays that a writ of *man-*

damus issue, directed to the said Frank P. Philbrick, treasurer as aforesaid, commanding him to pay to said relator the amount of said order out of the funds in his hands as said treasurer upon presentation to him of said order.

The mere statement of the facts agreed upon by the respective counsel clearly shows that the *mandamus* should issue. It matters not whether the act authorizing the formation of borough governments be constitutional, or whether the government of the borough of Ocean Beach be properly organized under the act. The commissioners and treasurer were *de facto* officers. The commissioners contracted the debt and they had authority to audit the bill and direct its payment by the treasurer out of the funds of the borough in his hands.

The treasurer had no option. His duty was to pay the bill upon presentation to him of the order by the relator. Let the *mandamus* issue.

III. Powers and Rights.

THE PEOPLE EX REL. WINSTANLEY V. WEBER.

Supreme Court of Illinois. June, 1878.
89 Ill. 347.

This was an application in this court by Thomas Winstanley, as city treasurer of the city of East St. Louis, for a writ of *mandamus* against Herman G. Weber, county collector of St. Clair county, to compel him to pay over to the relator moneys collected by him and taxes belonging to the city of East St. Louis. The defendant's plea presented the question of the validity of the relator's election.

Mr. Justice Dickey delivered the opinion of the court.

While the acts of an officer *de facto* are valid, in so far as the rights of the public are involved and in so far as the rights of third persons having an interest in such acts are concerned, still, where a party sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer *de facto*. To do this he must be an officer *de jure*. As an officer *de facto* he can claim nothing for himself. *People ex rel. Sullivan* v. *Weber*, 86 Ill. 283.

The commission under which relator claims title, recites that it

is issued in pursuance of an election held on the 16th day of April, 1878, and the answer to relator's petition states that "it is from this pretended election that relator obtains *all* the title he has to the pretended office claimed by him." This allegation of the answer is confessed by the demurrer.

In the case of *Stephens* v. *The People ex rel. ante*, 337, we have held void the election through which relator claims to have acquired the supposed office. The condition of the pleading precludes the relator from insisting that he is an officer *de lege*, under the appointment of the mayor. If the pleadings were otherwise the appointment relied upon in argument gave no title to the office without confirmation by *the city council*, and the body by which such confirmation is claimed was not *the proper body*,—was not "*the city council*" under the law. It follows that the relator is not a public officer of the character held necessary to entitle him to the relief sought.

The application for a writ of *mandamus* must be denied.

Mandamus refused.

ROMERO V. UNITED STATES.

Court of Claims of the United States. April, 1889.

24 Court of Claims Reports, 331.

RICHARDSON, C. J., delivered the opinion of the court.

On the 9th of June, 1885, during the recess of the Senate, the claimant was commissioned by the President to be agent for the Indians of the Pueblo Agency, in New Mexico, to fill a vacancy then existing, to hold the office, according to the form of the commission, "during the pleasure of the President of the United States for the time being, and until the end of the next session of the Senate of the United States, and no longer."

He was nominated to the Senate for appointment at the next session, but the Senate adjourned on the 5th of August, 1886, without having acted thereon. Still he continued to exercise the duties of the office until September 13, 1886, when his successor took charge of the agency and receipted for the property belonging thereto.

He has been paid the salary of the office up to the end of the session of the Senate, August 5, 1886. He brings this suit to

recover the salary of the office from that date until his successor took possession.

In his petition he sets up no claim for compensation as mere custodian of public property in his possession, nor does he allege or prove any specific property intrusted to him. It may be presumed that he had some public property, but its quantity and character, and the extent of responsibility arising therefrom, do not appear. Nor does it appear what would be a reasonable compensation for anything done by him. The salary established by law for the performance of all the duties of the office would not be a measure of compensation for the performance of part only of such duties. Many of the services required of an agent are of a higher order than the mere custody of property and maintaining possession until a successor is appointed, and in some cases they are delicate and confidential. (Rev. St. §§ 2058, 2086, 2090; *Act of March* 3, 1875, Supp. to Rev. St. ch. 132, § 4, p. 168.) Such services were undoubtedly taken into consideration by Congress in establishing the salary of the office, and went far towards increasing the amount. They could no longer be performed lawfully by the claimant after his official term had expired. The claimant must recover the whole salary or nothing, for we have no data for apportionment even if that were admissible.

The judicial decisions are uniform that one claiming a salary must prove his legal title to the office, and that an officer *de facto* and not *de jure* cannot maintain an action for salary. . . . . .

Two questions arise: First, did the claimant have a title to the office after the adjournment of the Senate? Second, if not, then is there anything in this case which takes it out of the general rule?

The Constitution provides, in article 2, section 3, paragraph 3, that "the President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions, which shall expire at the end of their next session." The form of the commission which has been in use from an early day, probably from the beginning, emphasizes the idea of limitation by adding the words *and no longer*. . . . .

On this claim of holding over after the expiration of the constitutional tenure much reliance is placed upon the decision of the Supreme Court of California in *Stratton* v. *Oulton*, 28 Cal. 44. Stratton was State librarian, whose term of office, fixed by statute, was four years. The court held that by common law officers appointed for a term of years held until their successors were ap-

pointed and qualified, and there was nothing in the constitution or statutes of California to change that rule of law held to be in force in that State.

In view of the Constitution and statutes of the United States, the opinions of Attorneys-General and of the Supreme Court, as well as the practice of the government so far as we have been able to ascertain, we do not think that any such principle of the common law has been adopted as applicable to public officers of the United States. Attorney-General Williams, in an opinion furnished to the Secretary of the Treasury, reviewed the case of *Stratton* v. *Oulton,* and came to a different conclusion from that reached by the California court (14 Op. Att. Gen., 262). Attorney-General Stanbery advised that the term of the Secretary of the Territory of New Mexico was limited to four years, and after its expiration the incumbent of the office had no right to exercise its functions (12 Op. Att. Gen. 130). . . . .

Congress also has proceeded upon the view of the law expressed in these opinions. Revised Statutes, section 2056, provides that "Each Indian agent shall hold his office for the term of four years." This was amended by enacting a substitute, May 27, 1882 (22 Stat. L. ch. 163, § 1, p. 87), in the same words, with this addition, "and until his successor is duly appointed and qualified."

Before the passage of the latter act Indian agents appointed for the term of four years under the former law were never treated nor regarded by the Interior Department, to which they belong, as holding over after the expiration of the stated term. Hence the necessity of the act of 1882, which would have been wholly unnecessary if the common-law rule of California were in force with reference to the public officers of the United States.

Independently of the foregoing considerations, the claimant urges that he is entitled to recover under regulations made by the President by authority of . . . the Revised Statutes. . . .

The authority of the President to make regulations is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress, and must be in execution of, and supplementary to, but not in conflict with, the statutes. *United States* v. *Symonds,* 120 U. S. R. 49.

We cannot give a construction to those regulations which would lengthen the term of office limited by the Constitution, by section 1769 of the Revised Statutes, and by the commission; nor a construction which would give to one whose commission had expired

by such limitation the salary or emoluments of an office declared to be in abeyance, without any salary, fees or emoluments attached thereto, and the duties of which are to be performed by some *other person*, as provided in said section 1769.

Further, it is not to be assumed that the President by these regulations intended to direct the payment of the money from the Treasury in clear violation of the . . . . . Revised Statutes. . . . . .

A more sensible construction may be given those regulations, bringing them within the undoubted power of the President to make. It is that they apply only to those Indian agents whose term of office does not expire by statute until the qualification of their successors. Practically they fix the date of qualification as the day on which the new appointee takes the last step necessary to put himself in possession of the means to perform the duties of the office. That done, the statute, not the regulation, determines to whom the salary belongs. Thus construed the regulations are reasonable and valid.

. . . . . .

It may be a hardship to the claimant to deny him pay for the time he performed duties after the expiration of his term of office, and, if so, his remedy is in Congress, as suggested by the Commissioner of Indian Affairs to the Secretary of the Interior, set out in finding VI.

The petition must be dismissed.

DOLAN V. MAYOR, &C.

Court of Appeals of New York. January, 1877.

68 N. Y. 274.

ANDREWS, J. The plaintiff on the 24th of May, 1872, was duly appointed assistant clerk of the District Court for the sixth judicial district in the city of New York, by the justice of that district, pursuant to the provisions of chapter 438 of the laws of 1872.

He thereupon duly qualified and took possession of the office, and held it until the first of January, 1873, on which day one Keating, claiming the office by virtue of an appointment made by the justice on the 31st of December, 1872, entered upon and con-

tinued to occupy the office until March 1, 1874, and excluded the plaintiff therefrom. On that day the plaintiff again came into possession of the office by virtue of a judgment of *ouster* obtained by him against Keating in an action of *quo warranto*.

. . . . . .

By the act of 1872 the salary of assistant clerk was fixed at $3,000 a year, and the comptroller of the city of New York was directed to pay it in monthly installments out of the city treasury. The salary was paid to Keating from the first of January, 1873, to the first of December, 1873. The salary for December, 1873, and January, 1874, has not been paid to any person. The plaintiff during the time he was excluded from the office, was ready to perform the duties, and proffered his services to the clerk, which were refused.

This action was brought, after the judgment in the *quo warranto* was rendered, to recover the salary of the office from January 1, 1873, to March 1, 1874. The court, on the trial, held that the plaintiff was not entitled to recover the salary prior to December 1, 1873, but that he was entitled to the salary from that time, and directed a verdict for the plaintiff for the amount of the salary for the three months preceding March 1, 1874. Both parties appealed to the General Term from the judgment entered upon the verdict. The General Term affirmed the judgment, and from the judgment of affirmance both parties have appealed to this court.

The question is, was the plaintiff entitled to recover the salary appurtenant to the office of assistant clerk, during the whole or any part of the term in which he was excluded from the possession of the office by Keating, acting under the illegal appointment of December 31, 1872.

That the plaintiff was the *de jure* officer, and that Keating usurped and unlawfully excluded the plaintiff from the office is no longer an open question.

. . . . . .

. . . . . It is the settled doctrine in this State, that the right to the salary and emoluments of a public office, attach to the true and not to the mere colorable title, and in an action brought by a person claiming to be a public officer for the fees and compensation given by law, his title to the office is in issue, and if that is defective and another has the real right, although not in possession, the plaintiff cannot recover. Actual incumbency merely gives no right to the salary or compensation.

. . . . . .

But it does not follow from the conclusion that the defendant could have successfully defended an action brought by Keating to recover the salary of assistant clerk, that it was not justified in not treating him as an officer *de jure* when claiming it, and paying it upon that assumption. It is clear that if the city could rightfully pay the salary to Keating during the actual incumbency, and has paid it, it cannot be required to pay it again to the plaintiff. We are of opinion that payment to a *de facto* public officer of the salary of the office, made while he is in possession, is a good defence to an action brought by a *de jure* officer to recover the same salary after he has acquired or regained possession.

. . . . . .

It is plain that in many cases the duty imposed upon the fiscal officers of the State, counties or cities to pay official salaries, could not be safely performed unless they are justified in acting upon the apparent title of claimants. The certificate of boards of canvassers certifying the election of a person to an elective office, is *prima facie* evidence of the title of the person whose election is certified. But it often happens that by reason of irregularities in conducting the election, or the admission of disqualified voters, the apparent title is overthrown and another person is adjudged to be rightfully entitled to the office. But this can seldom, if ever, be ascertained, except after a judicial inquiry; and in case of an appointed officer, the validity of the appointment often depends upon complicated questions of law or fact. If fiscal officers, upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay a salary a second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission and investigate and ascertain the real right and title. This, in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries, have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer *de jure*, without inquiring whether another has the better right.

Public policy accords with this view. Public officers are created in the interest and for the benefit of the public; such, at least, is the theory upon which statutes creating them are enacted and justified. Public and individual rights are, to a great extent, pro-

tected and enforced through official agencies, and the State and individual citizens are interested in having official functions regularly and continuously discharged. The services of persons clothed with an official character are constantly needed. They are called upon to execute the process of the courts, and to perform a great variety of acts affecting the public and individuals. It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the *de facto* officer, except at the peril of paying it a second time, if the title of the contestant should subsequently be established, it is easy to see that the public service would be greatly embarrassed and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this, in many cases, would interfere with the discharge of official functions.

It is well-settled that the acts of an officer *de facto* are valid so far as they concern the public or the rights of third persons who are interested in the things done.

. . . . . .

It remains to consider whether the plaintiff is entitled to recover the salary for the three months prior to March 1, 1874, during which the services were rendered by Keating, and for which no salary has been paid. The city has had the benefit of the services of assistant clerk during the time, rendered, it is true, by the *de facto* and not by the *de jure* officer. The plaintiff has regained possession of the office under a title which accrued prior to the time the services were rendered.

There is no apparent equity in permitting the city to escape from the payment of the unpaid salary, when claimed by the *de jure* officer. We think it may consistently be held that the defendant may treat the services as having been rendered by Keating for him, and that he may recover the unpaid salary upon that assumption. This does not interfere with the decision of this court in *Smith* v. *The Mayor*, 37 N. Y. 518.

The doctrine which we have been called upon to declare in determining this controversy is both reasonable and safe. It is desirable that official duties should be performed by officers legally elected or appointed. But the rules which allow the title of the officer to be questioned in an action for the salary, and which sub-

jects the *de facto* officer to liability for damages to the officer *de jure*, is a sufficient discouragement to attempt to take possession of an office by force or fraud, in the exclusion of the rightful claimant.

The judgment should be affirmed.

All concur, except RAPALLO, J., not voting.

Judgment affirmed.

NICHOLS V. MACLEAN.

Court of Appeals of New York. March, 1886.

101 N. Y. 526.

ANDREWS, J. The facts, upon which this controversy depends, are few and substantially undisputed. The plaintiff was duly appointed police commissioner of the city of New York, for a term of six years, from May 1, 1876, and duly qualified and entered upon and discharged the duties of the office until April 18, 1879. On that day the mayor of the city appointed the defendant, MacLean, police commissioner for the unexpired term of the plaintiff Nichols, the certificate of appointment reciting that the appointment was made by the mayor in pursuance of chapter 300 of the Laws of 1874, in place of Sydney P. Nichols, removed. Prior to the appointment of the defendant MacLean, the mayor had preferred charges against Nichols of official delinquency, upon which such proceedings were had that on the 5th day of April, 1879, the mayor made a certificate in writing removing the plaintiff from his office of police commissioner, which certificate with the reasons therefor he transmitted to the Governor, who on the 17th day of April, 1879, approved in writing of such removal. The plaintiff, in June, 1879, applied for a writ of *certiorari*, to review the proceedings removing him, which was issued August 12, 1879, addressed to the mayor, who made return thereto, and on February 11, 1880, judgment was rendered in the proceeding declaring that the proceedings of the mayor for the removal of Nichols and his judgment of removal "be and are hereby reversed, and in all things held for naught." . . . . . The defendant, MacLean, on the 18th day of April, 1879, on presenting his certificate of appointment was duly recognized by the board of police commissioners as commissioner in place of Nichols, and thereupon assumed

the duties of the office and continued to act as police commissioner until February 7, 1880, on which day the decision of the court in the *certiorari* proceeding having been called to the attention of the board, Nichols was officially recognized as commissioner, and on that day resumed, and thereafter continued to discharge the duties of the office. During the period between the 17th of April, 1880, the defendant drew and received from the city of New York $4,700 salary for that time of the office of police commissioner. It is found that the plaintiff during the time he was excluded from the office was ready and willing to perform the duties thereof, and it was proved that the plaintiff on the 18th day of April, 1879, upon presentation by the defendant of his certificate of appointment protested to the defendant that his removal was unauthorized and that there was no vacancy to be filled by the mayor. This action is brought to recover the salary received by the defendant during the time he served as police commissioner under the appointment of the mayor, and the sole question is whether, upon the facts found, the action lies.

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. . . . . The plaintiff, by his appointment, acquired the right to hold the office of police commissioner for six years, and to receive the salary subject to removal upon a hearing, for cause, which right, although not technically property, was valuable and is under the protection of the law. From a very early period of the law, the invasion of a right to hold and exercise the duties of a public office has been recognized as a legal wrong for which the law affords a remedy. . . . . That the action of the mayor in removing the plaintiff was wrongful, was adjudicated in the *certiorari* proceedings, and from the judgment therein no appeal was taken. . . . . Whether the judgment *ipso facto* worked a reinstatement of the plaintiff, we need not now consider. The defendant voluntarily surrendered the office to the plaintiff, or at least he acquiesced in his resuming possession.

. . . . . .

. . . . . But it is insisted that, conceding the unlawful expulsion, and the intrusion by the defendant, it is not *res judicata* in this State that an action can be maintained by the party dispossessed, against the intruder, to recover the emoluments of the office received by him. In the case of *Dolan* v. *Mayor, etc.* (68 N. Y. 274), it was assumed that such an action could be maintained, and authorities were cited to maintain the proposition. The determination of this question was not, perhaps, essential to sustain the

judgment in that case. But we think the doctrine is well founded in reason and authority. The plaintiff being the officer *de jure*, was entitled to earn the salary. It is true that he did not render the service for which the salary is the compensation. But he was ready and willing to render it, and was prevented by the conjoint acts of the mayor and the defendant. The case of *McVeany* v. *The Mayor* (80 N. Y. 185), shows that the right to a salary of an office is not necessarily dependent upon the actual rendition of service by the claimant. In that case the plaintiff was allowed to recover from the city, salary from the time judgment of ouster against the incumbent was pronounced, although the plaintiff rendered no personal service and the salary had been paid to the intruder. In the *Dolan Case (supra)*, the claimant recovered the salary unpaid during the time Keating discharged the duties of the office. . . . . The exclusion of a *de jure* officer from his office is a legal wrong committed by the intruder. In a legal view it is immaterial that the defendant may have acted in good faith, or that he supposed he had the better title. A good motive is not an adequate answer to a claim for indemnity for a violated right. There is a great preponderance of authority in support of the doctrine that the *de jure* officer can recover against the intruder, the damages resulting from the intrusion, and that as a general rule, the salary annexed to the office and received by the defendant measures the loss. *Dolan* v. *Mayor, etc., supra.; Lawlor* v. *Alton*, L. R. 8 Ir. 160; *Glascock* v. *Lyons*, 20 Ind. 1; *Douglass* v. *State*, 31 Id. 429; *People* v. *Miller*, 24 Mich. 458; *Dorsey* v. *Smith*, 28 Cal. 21; *Segan* v. *Crenshaw*, 10 La. Ann. 239; *U. S.* v. *Addison*, 6 Wall. 291. But as a final point the defendant invokes for his protection, the doctrine which protects rights acquired on the faith of a judgment, notwithstanding its subsequent reversal. We think the doctrine is inapplicable to the case. The appointment of the mayor and the defendant's assumption of office thereunder, made him an officer *de facto* merely. "An officer *de facto*," says Chancellor Walworth, "is one who comes into a legal and constitutional office, by color of a legal appointment or election to that office." *People* v. *White*, 24 Wend. 518, 539. The proceeding of the mayor in removing Nichols, was so far judicial as to authorize it to be reviewed on *certiorari*. It was not a proceeding in a court of justice under the forms and solemnities of judicial proceedings in courts, to establish the rights of litigants. The defendant did not acquire his title to the office under the so-called judgment rendered by the mayor, but under a separate and distinct proceeding sub-

sequent thereto, by which the defendant became invested with the character of an officer *de facto*. It is abundantly settled by authority that an officer *de facto* can as a general rule assert no right of property, and that his acts are void as to himself unless he is also an officer *de jure*. *Green* v. *Burke*, 23 Wend. 490; *People* v. *Nostrand*, 46 N. Y. 375; Bronson, J., in *People* v. *Hopson*, *supra*.

. . . . . .

In the *Dolan Case (supra)*, the appointment of Keating was made under an ambiguous statute, under a claim of right, and was regular in form, but the court were of opinion that this would not protect him against a suit by the officer *de jure* to recover the salary received by him. We think there is no solid distinction between the cases. The defendant took the risk of the validity of his title, and the loss should fall upon him rather than upon the plaintiff.

Upon the whole case we are of opinion that the judgment should be affirmed.

All concur, except RAPALLO and MILLER, JJ., not voting.

Judgment affirmed.

But see Strahr v. Curran, 15 Vroom. N. J. L. 181. A *de facto* officer may be compelled to perform the duties of the office which he has assumed. State v. Supervisors, 21 Wis. 282, *supra*.

THE STATE V. DIERBERGER.

Supreme Court of Missouri. October, 1886.

90 Missouri Reports 369.

BLACK, J. The defendant was tried in the St. Louis Criminal Court on an indictment for murder in the first degree and was convicted of murder in the second degree.

The evidence shows that Dierberger, the defendant, his wife and sister, got into a street car in St. Louis. The deceased, John Horne, his wife, and Joseph Jackson, got on the same car. It was about twelve o'clock at night and the parties were going to their respective homes. The car was well filled with passengers, and Horne and Jackson, who, the evidence tends to show, were somewhat under the influence of intoxicants, went to the front platform and eventually got into a dispute with the driver, which resulted in the use of boisterous language, and a scuffle between the driver and Jack-

son. The conductor, followed by the defendant, went from the rear to the front of the car, and when the door was opened, the driver, Jackson, and perhaps Horne, fell into the aisle of the car. There is evidence that the defendant went to the front platform first to stop the car, which by this time was going at a rapid rate of speed. At all events, immediately, and while the parties were all in the car, defendant stepped up to Jackson and said he was an officer and would arrest him, and at the same time took hold of Jackson, who said, "If you are an officer, I will go with you." Horne then said, "Don't go, Jackson, he is no officer." There is also evidence that Horne said, "I don't give a damn what you are you can't take him." Other words passed between Horne and the defendant, when the latter drew a pistol, but at the request of the conductor, put it away. It is said that in less than a half a minute defendant pressed Horne to the front of the car and fired two shots, one of which killed Horne. Again, there is evidence that Jackson hit defendant when Horne came to Jackson's aid and a fight or scuffle ensued in which defendant received bruises and cuts about the face and in which Horne was killed by one of two shots fired by defendant.

The defendant put in evidence a written and formal appointment as deputy constable dated April 21, 1883, and signed by John F. C. Frese, constable of the thirteenth district. It is conceded this appointment was not filed with the city register, who performs the duties of a county clerk, and that defendant had taken no official oath. . . . The court, among other instructions, told the jury in substance that, under the evidence, defendant was not a deputy constable under the laws of this state; and that a private person who assumes to act as an officer of the law, does so at his peril, and although the jury might believe that the defendant in good faith believed he was a deputy constable, yet such belief did not authorize him to act as such deputy, nor shield him from unlawful acts.

The statute, section 652, gives every constable power to appoint deputies, for whose conduct he shall be answerable, and provides that the appointment shall be filed in the office of the county clerk. . . . The failure to file the appointment cannot deprive the defendant of his right to say that he was a deputy constable.

The more difficult question arises from the failure of the defendant to take an oath of office. . . . Section 6, article 14, of the constitution requires all officers under the authority of the

state, before entering upon the discharge of the duties of their respective offices, to take and subscribe an oath or affirmation to support the constitution and to faithfully demean themselves in office. Clearly the deputy constable is an officer under the authority of the state. He should take the oath, and until he does so, he is not an officer *de jure;* and the further question is, was he an officer *de facto.*

. . . . . .

The act of the defendant here in question was probably his first act as deputy, but we do not see how that can make any difference, for the constable had the undoubted right to make the appointment, and the appointment was in every way a good, formal and valid appointment. The appointment made and constituted him a deputy; and though he failed to take the oath he was an officer *de facto.* The principle of law is well settled that the acts of such an officer are as effectual when they concern the public, or the rights of third persons, as though they were officers *de jure.* 21 Am. Dec. 213; 19 Am. Dec. 63, and notes; 50 Mo. 593; 72 Mo. 189.

Generally, where an officer sues or defends in his own right, as a public officer, it is not sufficient that he be merely an officer *de facto,* but to do this he must be an officer *de jure. People* v. *Weber,* 89 Ill. 348; *Patterson* v. *Miller,* 2 Met. (Ky.) 493; *Turner et al.* v. *Keller et al.,* 38 Mo. 332. It has been said as to an officer *de facto,* that the office is void as to the officer himself, though valid as to strangers.

In *People* v. *Hopson et al.,* 1 Denio 575, where the defendants were indicted for resisting a constable in the execution of process which ran in favor of Avery and against said Hopson, the defendants offered to prove that the constable had never taken the oath of office, nor given security required by law; and so was not a constable. As to this offer the court said: "The evidence would be proper if Lascells (the constable), instead of the people, was the party complaining of an injury. If he were suing to recover damages for the assault, it would probably be a good answer to the action that he was not a legal officer, but a wrongdoer, who might be resisted. And clearly he cannot recover fees, or set up any right of property on the ground that he is an officer *de facto,* unless he is an officer *de jure.* . . . But it is equally well settled that the acts of an officer *de facto,* though his title may be bad, are valid so far as they concern the public, or rights of third persons who have an interest in the

things done. Society could hardly exist without such a rule. . . . . The people are prosecuting for a breach of the public peace; and it is enough that Lascells was an officer *de facto,* having color of lawful authority. The rights of the creditor, the due administration of justice, and the good order of society, all concur in requiring that he should be respected as an officer until his title has been set aside by due process of law." See also, to the same effect, *Heath* v. *State,* 36 Ala. 273. Bishop says the better opinion is that third persons may be indicted for resisting a *de facto* officer. 1 Bish. on Crim. Law (8 ed.), sec. 464. Wharton, in making reference to this current of authority, says the rule ought not to be extended to cases where the object is to test the right of the party resisted to hold office. Whar. on Crim. Law (8 ed.), sec. 648.

The authorities show that Horne, and indeed, Jackson, had no right to resist defendant, when in the performance of the legitimate duties of a constable, and would be liable for an indictment for so doing. This being so, it is difficult to see why the defendant may not say that he was an officer *de facto,* and be entitled to protection to the extent that others were bound to respect his official character. It can hardly be said that the state resorts to this proceeding to test the right of the defendant to perform the functions of a deputy constable, when there are so many other more appropriate proceedings at hand; but it may rather be said the state here seeks to punish him for doing that which he had no right to do, though an officer he was. The question is by no means free from doubt, but we conclude the defendant should be treated in this case as an officer, and the instructions should proceed upon the theory that he was one. There seems to be no doubt but the defendant believed he was a deputy constable by right, in all respects, and the conclusion we reached we believe to be in the interest of good order.

The judgment is reversed, and the cause remanded for trial *de novo.* All concur.

One who resists a *de facto* officer in the discharge of the duties of the office may be punished for unlawful resistance to an officer. Bohannan v. State, 89 Ga. 451.

BOONE COUNTY V. JONES ET AL.

Supreme Court of Iowa. December, 1880.

54 Iowa Reports, 699.

At the general election in the year 1873, the defendant Geo. E. Jones was elected county treasurer of Boone county, for two years from January, 1874. He served the full term of the office to which he was elected. At the general election in 1875, one J. W. Snell was elected to said office, for the term commencing in January, 1876. After the said election, and before the first Monday in January, 1876, the said Snell departed this life without having qualified, or in any manner entered upon the duties of said office. A vacancy was thereby created and on the 3d day of January, 1876, the defendant Jones executed a bond to said county as a holding over officer, and otherwise qualified and continued as the incumbent of said office, until the expiration of the term in January, 1878. At the general election in 1876 the electors of said county again voted and balloted for candidates to fill the vacancy in said office, for the residue of the said term to which said Snell had been elected, and the said Geo. E. Jones was again declared duly elected, and thereafter, and on the 17th day of November, 1876, the said Jones, and the other defendants as his sureties, executed a treasurer's bond to said county.

. . . . . .

This action was brought upon this bond, and it was claimed that upon his final settlement with the county in January, 1878, the said Jones proved to be a defaulter in a large amount of money, for which judgment was prayed against him and the other defendants as his sureties.

The answers of the defendants in substance denied . . . . the validity of said election and bond . . . . and denied that Jones ever held the office under said pretended election, and averred that he held the full term for which said Snell was elected as a holding over officer, and said Jones averred that there were two other actions pending against him for the same cause of action embraced in this suit.

There was a trial by jury, and a verdict and judgment for the plaintiff for $13,598. Defendants appeal.

ROTHROCK, J. I. . . . . When the bond was offered in evidence, objection was made thereto upon the grounds that it

was not a valid instrument, because the election therein recited was void, not being authorized by law, and because there was no vacancy at that time existing. . . . . These objections were overruled. The same questions were presented in certain instructions which the defendants asked to be given to the jury, and the instructions were refused.

. . . . . .

We think it is not material to inquire whether the defendant Jones was entitled to hold over for the full term for which Snell was elected, nor to determine whether his election to fill a vacancy was regular, and authorized by law. We are united in the opinion that Jones and his sureties are concluded by the recitals in this bond, and cannot be heard to dispute the regularity of the election. Under the recitals of this bond he was, as between the parties thereto, *de facto* the treasurer of the county. If public officers are allowed to escape the consequences of malfeasance in office after the full term of their election has expired, because of an alleged illegal election, it would be a bolder and more glaring instance of allowing a man to take advantage of his own wrong than any case that has come under our observation.

. . . . . .

Affirmed.

The rule that one in possession of an office may not impeach his own title prevents an incumbent in office from escaping the consequences of either a tortious or criminal act committed by him in the discharge of the functions of the office. Longacre v. State, 3 Miss. 637; Diggs v. State, 49 Ala. 311.

CHAPTER IV.

QUALIFICATIONS FOR OFFICE.

I. Power of Legislature to Provide Qualifications.

1. In General.

BRADLEY V. CLARK.

Supreme Court of California. June, 1901.

133 California, 196.

Henshaw, J. This is an action instituted by an elector of the city of Sacramento, under the provisions of the Purity of Elections Act (Stats. 1893, p. 15), contesting the right of the defendant, mayor-elect of the city, to his office. After trial, judgment passed for the defendant, and from that judgment contestant appeals, the evidence being brought up for review by bill of exceptions.

It is charged by contestant that, in violation of the Purity of Elections Act, the defendant was guilty of certain improper practices, in that, 1. He did not file a statement of his election expenses, supported by his affidavit, as required by law; . . .

Respondent contends that these provisions, or at least such of them as require a successful candidate to support his statement by his oath as a prerequisite to his right to take office, are violative of the constitution of the state, and therefore void. From this conclusion we think there can be no escape. Section 3 of article XX of our state constitution declares: "Members of the legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States and the constitution of the state of California, and that I will faithfully discharge the duties of the office of ———————— according to the best of my ability,' and no other oath, declaration, or test shall be required as a

qualification for any office or public trust." The constitution itself speaks of this prescribed oath as a "qualification" for an office. Equally is the oath required to be taken by the successful candidate a qualification for office, for the very provision of the act is, that, for his refusal or neglect in this regard, or for the making of a false statement, he shall be deprived of his office, and shall forfeit any office to which he may have been elected.

. . . . . .

Had our constitution merely declared, as some do, that no other "test" than the one prescribed should be exacted of an officer elect, it might then be argued with some force that it had reference to such tests, in their nature religious, as those required by the act of Charles II, directed against Roman Catholics and dissenters, which remained a blot upon the English statute-books until 1828. But the constitution has designedly said, not alone that no other test should be required, but that no other "oath or declaration" should be exacted. This language leaves as the only matter for determination the single question, whether this act does impose an oath or test substantially differing from that prescribed by the constitution. (*Cohen* v. *Wright*, 22 Cal. 294.) That it does prescribe a substantially different oath, in addition to that made exclusive by the language of the constitution, the very reading of the section makes manifest. But, in holding that the legislature may not prescribe this additional oath upon a successful candidate as a prerequisite to his right to take office, and as an additional qualification to those enunciated by the constitution, we do not mean to be understood as saying that the legislature may not with propriety provide that a candidate shall forfeit his office for the doing of any of the inhibited acts, or for the failure to do any of the required acts set forth in the Purity of Elections Act. The legislature would have the undoubted power to require an officer elect to file just such a statement as the law now prescribes, and to provide that for a failure so to do he should forfeit his office, or his right to office; but, under the strict mandate of the constitution, it has no right to exact this different and additional oath or affirmation before the taking of office, as a prerequisite thereto. So much, therefore, of the act as requires the candidate to support his statement by the above-quoted oath as a prerequisite to the right to take office is void.

2. *Property and Educational Qualifications.*

STATE EX REL. THOMPSON V. McALLISTER.

Supreme Court of Appeals of West Virginia. November, 1893.
38 W. Va. 485.

DENT, J.

. . . . . .

Appellants assign three grounds of error in their petition for writ of error, viz.: First, it was error in the Circuit Court to hold the statute, which requires councilmen to be freeholders, unconstitutional;

. . . . . .

In my opinion there are only two questions suggested by the facts in this case as proper, at the present time, for the consideration of this court: (1) Is the law containing the free-hold requirement constitutional? . . . . .

1. In determining this constitutional question we find the rule plainly laid down in the case of *State* v. *Dent*, 25 W. Va. 19, in these words, to wit: "Article 6, section 1, of our constitution provides: 'The legislative power shall be vested in a senate and a house of delegates.' This obviously confers on them all legislative power, except such as they are prohibited by the constitution in other provisions from exercising." And the person claiming that an act of the legislature is an infringement of the restrictions of the constitution must point out the provision plainly forbidding, either by express words or by inevitable implication, the passage of such act: And, if none such exists, the act, however unjust or unreasonable it may seem, is valid, and must be sustained by this court. Judge Cooley, as quoted approvingly in the above case, lays down the rule that "any legislative act which does not encroach upon the powers apportioned to other departments of the government being *prima facie* valid must be enforced unless restrictions upon the legislative authority can be pointed out in the constitution and the case shown to come within them."

The defendants in error recognizing the binding force of this rule point out three sections of the constitution all and each of which they claim are violated by the act in question:

First. Section 4 article IV, which provides that "No person except a citizen entitled to vote shall be elected or appointed

to any office, state, county or municipal." Defendants in error argue that because this section forbids any persons except qualified electors to hold office, by just implication, the converse of the proposition is also included in the meaning of the section; that is to say, that all electors are duly qualified to hold office. Such reasoning is very fallacious. This provision was simply intended to limit the number from whom the various officers of this state might be chosen to those having a voice in the selection of such officers, and not in any sense intended to determine the qualifications necessary to properly discharge the duties of any office. For the electors to say in the constitution adopted by them that "no one but ourselves shall ever be elected or appointed to any office in this state" does not, by implication, say to the legislature, further, "You shall pass no law that will prevent any of us from holding office," for such an important matter as this would not be left to implication, if the electors had considered such a provision desirable.

While we have no decision in this state touching this question, the highest tribunals of other states have construed similar provisions in their state constitutions as above indicated. In the case of *Darrow* v. *People*, 8 Col. 420 (8 Pac. 661) the supreme court of the state, in passing on the same question here raised, says: "Counsel argue that section 6 art. VII of the constitution provides that 'no person except a qualified elector shall be elected to any civil or military office in the state,' by implication, prohibits the legislature from adding the property qualification under consideration. There is nothing in the constitution which expressly designates the qualifications of councilmen in a city or town, and this section contains the only language that can possibly be construed as applicable thereto. But it will be observed that the language used is negative in form: that it simply prohibits the election or appointment to office of one not a qualified elector. There is no conflict between it and the statute. By providing that a supervisor or an alderman shall be a taxpayer, the legislature does not declare that he need not be an elector. Nor is the provision at all unreasonable. . . . . The right to vote and the right to hold office must not be confused. Citizenship and the requisite sex, age and residence, constitute the individual a legal voter, but other qualifications are absolutely essential to the efficient performance of the duties connected with almost every office; and certainly no doubtful implication should be favored, for the purpose of denying the

right to demand such additional qualifications as the nature of the particular office may reasonably require. We not not believe that the framers of the constitution, by this provision, intended to say that the right to vote should be the sole and exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualification should ever be demanded, and no other disqualifications should be imposed. If, as has been well said, they 'had intended to take away from the legislature the power to name disqualifications for office other than the one named in the constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration.' *State* v. *Covington*, 29 Ohio St. 102." In the latter decision the court laid down the law in a syllabus as follows, to wit: "The provision in the constitution (section 4, art. 15) that no person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector does not by implication forbid the legislature to require other reasonable qualifications for office."[1]

Second. The next claim of the counsel is that the latter clause of section 5, art. IV, is violated, which is in these words: "And no other oath, declaration or test shall be required as a qualification unless herein otherwise provided;" his argument being that the freehold requirement is a test, within the meaning of the constitution. The assertion is so unfounded as to hardly need refutation. This clause is simply an application of section 11, art. III, to the case of officeholders, which is in these words: "Sec. 11, Political tests, requiring persons as a prerequisite to the enjoyment of their civil and political rights, to purge themselves by their own oaths of past alleged offenses, are repugnant to the principles of free government, and are cruel and oppressive. No religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal or pursue any profession or employment. Nor shall any person be deprived by law, of any right, or privilege, because of any act done prior to the passage of such law."

As will be seen at a glance, nothing is said about holding office, in this section, but it is made to apply alone to the right "to vote, serve as a juror, plead, sue, appeal or pursue any profession or employment." To remedy the omission here, the con-

[1] This case held that the legislature might provide that the ability to read and write should be a qualification for the office in question.

stitution makers added the clauses to section 5, art. IV, which refers alone to political and religious tests as a prerequisite or qualification for office and has nothing whatever to do with any just qualification that the legislature may deem necessary to a proper discharge of the functions of the office.

. . . . . .

Third. The last claim of the counsel is that the provision complained of is in violation of section 8, art. IV, of the constitution, in which the legislature is empowered to "prescribe by general laws the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected appointed and removed." This section includes all municipal officers, and was only intended to require the legislature to enact general, and not special, laws in relation to the matters included in the section. But the counsel argue that "by granting the legislature authority to establish offices, and provide the term of office, powers, duties, compensation and manner of election and removal, the power to add a qualification, not being given, is excluded by implication." The learned counsel appear to forget the difference so often defined between the federal and state constitutions; the former being strictly a grant of powers, while the latter is a limitation or restriction on the powers of the state legislature, which otherwise would be supreme in all legislative matters, as it is now in all cases wherein not restricted by the constitution—that instrument itself so declaring, as heretofore mentioned. And for the very reason that the power to prescribe qualifications is not mentioned in this section, the legislature has unrestricted control of that power. And it has been held by the court of appeals of another state that the same kind of provision gave the legislature entire control over all such officers; that the power to prescribe the manner in which they shall be elected and appointed included within it, necessarily, the power to prescribe civil service examinations, or to prescribe that they should be chosen from a class of citizens who possess some qualifications that specially fit them for office or render them efficient officers.

. . . . . .

The judgment of the Circuit Court is reversed, the *mandamus nisi* is quashed, and these proceedings are dismissed, at the cost of the relators.

For educational qualifications see Rogers v. Common Council, 123 N. Y. 173, *infra*. But the legislature may not, where a power of appoint-

ment is vested in an authority, by the constitution, provide such qualifications as will deprive such authority of all discretion in the exercise of such power. People ex rel Balcom v. Mosher, 163 N. Y. 32, *supra*.

BROWN V. RUSSELL.

Supreme Judicial Court of Massachusetts. April, 1896.
166 Massachusetts 14.

PETITION, filed July 22, 1895, for a writ of mandamus, to Charles Theodore Russell, Jr., Arthur Lord, and Edward P. Wilbur, Civil Service Commissioners of Massachusetts, praying that they be required to restore the petitioner to the highest place upon the list of candidates eligible for certification and appointment to a position on the detective force of the district police of the Commonwealth, a preference for certification and appointment having been given to one Edward D. Bean, conformably to the provisions of St. 1895, c. 501. Hearing before *Allen*, J., who, at the request of the petitioner, and with the consent of the respondents, reserved the case for the determination of the full court. The facts appear in the opinion.

FIELD, C. J. In determining the principal questions in this case it is necessary to consider the statutes relating to the civil service, and particularly St. 1895, c. 501. . . . . It is obvious that the civil service statutes and rules relate only to certain subordinate offices and employments which have been created by the legislature. None of them is an office or employment of which the duties, tenure, or qualifications are prescribed by the Constitution.

In the present case the petitioner is not a veteran, and, after examination, was placed at the head of the list of candidates eligible for certification and appointment to a position on the detective force of the district police of the Commonwealth, and he remained at the head of the list until July, 1895, when the commissioners placed one Edward D. Bean at the head of the list, and reduced the petitioner to the second place. Bean had made application as a veteran, under St. 1895, c. 501, § 2, and, having been found to be a veteran, was without examination placed first upon the list; and, so far as appears, he is the only veteran on the list. The district police are appointed by the

Governor of the Commonwealth, and are subject to removal by the Governor. Pub. Sts. c. 103, § 1. If the Governor makes requisition upon the commissioners for a candidate for appointment to the office of a detective upon this police force, it is made the duty of the commissioners, by the St. of 1895, to certify the name of Edward D. Bean for appointment, and of the Governor to appoint him, if he appoints anybody. The Governor, perhaps, may refuse to appoint anybody, if he is of opinion that Bean is not qualified to perform the duties of a detective on this force; or he may wait until more veterans than one are on the list of persons eligible to such an appointment, and make his selection from them; or he may appoint Bean, and remove him if he finds him incompetent. But then, if Bean is continued on the list, and is the only veteran on it, or if his application is considered as exhausted by one certification and he makes a new application, the statutes, literally construed, make it the duty of the commissioners to put his name again at the head of the list for appointment, and on requisition by the Governor again to certify him for appointment, and so on, *toties quoties,* so long as he remains on the list.

It is to be noticed that the class of veterans, as defined by the statutes, is not a class which anybody can become qualified to enter by any services which he may perform, or by any attainments which he may acquire, but it is a class fixed and determined by services which were rendered a long time before any of the statutes were passed. It is also to be noticed that the fact of having been a veteran within the meaning of the statute in and of itself has little tendency to show that the applicant is specially qualified to perform the duties of many of the offices to which the civil service statutes and rules relate. The principal purpose of exempting veterans from submitting to an examination must be that veterans sometimes may be appointed to an office or employment who would be found on examination not qualified to perform the duties of the office or employment which they seek. One, and perhaps the chief, purpose of the exemption must be to reward veterans for their services in the war of the rebellion. The reward is not in the nature of a pension or payment of money, but of an office or employment, the salary or pay of which the veteran is to receive. The provisions of the statutes exempting Veterans are general in their nature, and relate to all the offices or employments that have been or may be included within the civil service

rules. From the earliest times most nations have conferred honors and offices upon those who have rendered distinguished service to the State, particularly in war. These honors and offices have been conferred upon persons voluntarily selected, and pensions and rewards sometimes have been given to whole classes of persons, of which the statutes of the Commonwealth relating to the "Aid to soldiers and sailors and to their families," and the statutes of the United States relating to pensions, are well known examples; but the statute of 1895 under consideration affords the first instance, so far as we know, in this Commonwealth, where the appointing power has been compelled to appoint persons of a certain class to office in preference to all other persons, whether they are or are not thought to be qualified for the office by the appointing power, or by some public officer or some impartial and disinterested board of officers or persons invested by law with the power and responsibility of determining the qualifications of the persons to be appointed.

The Legislature, in establishing offices not provided for by the Constitution, has often required that the persons or some of the persons to be appointed shall possess certain qualifications, or that some of them shall be women and some men, but in all cases, so far as we are aware, the qualifications required bear such a relation to the duties imposed that they tend to secure that kind and degree of knowledge, experience, and impartiality which are requisite for the satisfactory performance of the duties, and it is open to any person to acquire the qualifications required. When women are to be appointed, there is a satisfactory reason in the nature of the office or employment why this should be done. In every such case some discretion usually has been left to the appointing power in the selection of the particular persons to be appointed. The peculiarity of the civil service statutes and rules, if St. 1895, c. 501, §§ 2 and 6, be enforced, is that very little is left to the discretion of the appointing power in the selection of persons if there are veterans who wish to be appointed. The civil service commissioners, in making up the list and in certifying the persons to be appointed, must proceed in a certain way designated by the statutes and the rules, and the appointments must be made, if at all, from the persons so certified. Before the passage of St. 1895, c. 501, it was in the discretion of the appointing power whether veterans who had been put upon any list without an examination, pursuant to St. 1887, c. 437, should or should not be certified for appointment by the com-

missioners, and it was also in the discretion of the appointing power whether, if such veterans were certified, they should be appointed. But if veterans make application under St. 1895, c. 501, § 2, they are to be preferred "for certification and appointment in preference to all other applicants not veterans, except women," and, as separate lists are made up for the different offices and employments, appointments from each list must be made from veterans, if any man is appointed, and if there are veterans on the list.

. . . . . .

It is the contention of the petitioner that the privileges given to veterans by the St. 1895, c. 501, §§ 2 and 6, are in violation of the principles which underlie our system of government implied in the Constitution of the Commonwealth, and also are in violation of certain express provisions of the Constitution. . . .

Article 7 is as follows: "Government is instituted for the common good; for the protection, safety, prosperity, and happineses of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore, the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it."

This article is declarative of the ends of the institution of government. It may be said to be fairly within the intent of this article that public offices, which are the instrumentalities of government, ought not to be created or filled for the profit, honor, or private interest of any one man, family, or class of men, but only for the protection, safety, prosperity, and happiness of the people, and for the common good.

Article 6 is as follows: "No man, nor corporation or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge is absurd and unnatural."

. . . . . .

In our opinion, the meaning of these words in this article, so far as they are applicable to public offices, is that only on consideration of services to be rendered to the public therefor can

a man, corporation, or association of men obtain advantages or particular and exclusive privileges distinct from those of the community. A person may obtain the advantages or privileges attached to a public office in consideration of his performing the duties of the office. It is for the purpose of rendering service to the public in a public office that advantages and privileges distinct from those of the community may be obtained. The meaning of this article was somewhat considered in *Hewitt* v. *Charier,* 16 Pick. 353, and it was held that St. 1818, c. 113, was not in violation of the article. It was there held that the leading purpose of that statute was to guard the public against ignorance, negligence, and carelessness in the practice of physic and surgery, and that the exclusive privileges granted to such persons as shall have been licensed by the officers of the Massachusetts Medical Society, or have been graduated doctors of medicine from Harvard University, were only incidental to the leading purpose of the statute. In that case, as in others where a license is required before any one can engage in certain professions or pursuits, a service is rendered to the public by the exercise on the part of those licensed of the skill, knowledge, and experience required to obtain a license, and by the exclusion of ignorant and incapable persons from the profession or pursuit. But it may be questioned whether this article of the Declaration of Rights was intended to apply to private pursuits and employments, and whether it is not to be confined to political and civil rights and privileges.

. . . . . .

The purpose of St. 1895, c. 501, §§ 2 and 6, is to make the appointment of veterans compulsory, if they desire to be appointed, whether the appointing power or the commissioners think they are or are not qualified to perform the duties of the office or employment which they seek. . . .

The principal question of law in this case, broadly stated, is therefore as follows: Can the Legislature constitutionally provide that certain public offices and employments which it has created shall be filled by veterans in preferment to all other persons, whether the veterans are or are not found or thought to be actually qualified to perform the duties of the offices and employments by some impartial and competent officer or board charged with some public duty in making the appointments? If such legislation is not constitutional as regards public offices, the question incidentally may arise whether a distinction can be made

between public offices and employments by the public which are not offices.

Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not the profit, honor, or private interest of any one man, family, or class of men. In our form of government it is fundamental that public offices are a public trust, and that the persons to be appointed should be selected solely with a view to the public welfare. In offices which are created by the Legislature, where the method of appointment is not prescribed by the Constitution, the Legislature, if no limitation is put upon its power by the Constitution, can take upon itself the responsibility of selecting the persons to be appointed, or can confer the power of appointment upon public officers or boards, or upon the inhabitants of cities, towns, or districts; but we think that it is inconsistent with the nature of our government, and particularly with articles 6 and 7 of our Declaration of Rights, that the appointing power should be compelled by legislation to appoint to public offices persons of a certain class in preference to all others, without the exercise on its part of any discretion, and without the favorable judgment of some legally constituted officer or board designated by law to inquire and determine whether the persons to be appointed are actually qualified to perform the duties which pertain to the offices.

There are many employments by the Commonwealth, or by the cities and towns of the Commonwealth, which do not constitute the employee a public officer. The work of the Commonwealth, and of the cities and towns, must be done by agents or servants, and much of it is of the nature of an employment. . . . . .

The persons appointed to the detective department of the district police force of the commonwealth, under Pub. Sts. c. 103, and the acts in amendment thereof, are public officers, and not merely employees of the Commonwealth. They are appointed by the Governor for the term of three years, subject to removal by the Governor, and they "have and exercise throughout the Commonwealth all the powers of constables (except the service of civil process), police officers, and watchmen, and may be transferred from one district to another; and the Governor may at any time command their services in suppressing riots and in preserving the peace." Pub. Sts. c. 103, § 2. They give bonds to the Treasurer of the Commonwealth and receive a stated salary from the treasury of the Commonwealth. They have and exer-

cise some of the powers of government. We are of opinion that §§ 2 and 6 of St. 1895, c. 501, so far as they purport absolutely to give to veterans particular and exclusive privileges distinct from those of the community in obtaining public office, cannot be upheld as enactments within the constitutional power of the General Court.

The result is, that the commissioners were not authorized by St. 1895, c. 501, §§ 2 and 6, without an examination, to place the name of Edward D. Bean at the head of the list to be certified for appointment upon the detective force of the district police of the Commonwealth in preference to all other applicants not veterans or women; and that they should be commanded to strike his name from the list.

Mandamus to issue accordingly

MATTER OF WORTMAN.

New York Supreme Court. Erie Special Term; July, 1888.

22 Abbott's New Cases 137.

Motion for a mandamus to compel the common council of the city of Buffalo to give its consent to the appointment of the petitioner to the position of street inspector.

DANIELS, J. The applicant shows by his petitioner that the street commissioner of the city of Buffalo was empowered by the common council of the city to select thirteen health and street inspectors of the city of Buffalo; that under the civil service rules adopted and in force in the city of Buffalo, the relator was certified to the street commissioner for one of such appointments. And his selection for that office was reported by the commissioner to the common council of the city.

By section 50 of title 2 of the existing charter of the city, the street commissioner was empowered by and with the advice and consent of the common council, to appoint the applicant with a sufficient number of others to supply the offices as street and health inspectors of the city. The common council, however in the action which they took upon the selections by the street commissioner on the 7th day of May, 1888, declined to consent to the appointment of the applicant, and it "is to

oblige the common council to give such consent that this application for the writ of mandamus has been made. And it proceeds upon the statement that the applicant is an honorably discharged Union soldier of the war of the rebellion, having suffered no physical impairment incapacitating him from the full performance of his duty as such street and health inspector, and having the business capacity necessary to discharge the duties of the position, and was so certified by said civil service commission to said street commissioner."

It is further stated in the petition "that subsequent to such appointment and on or about the 7th of May, 1888, the said Henry Quinn, street commissioner, communicated and transmitted to the common council of the city of Buffalo his appointment of your petitioner as health and street inspector."

The application in behalf of the petitioner has been made under the authority of chapter 464 of the Laws of 1887, which has provided that "in every public department and upon all public works of the State of New York and of the cities, towns, and villages thereof, and also in non-competitive examinations under the civil service laws, rules or regulations of the same, whereby they apply, honorably discharged Union soldiers and sailors shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the business capacity necessary to discharge the duties of the position involved."

. . . . . .

It has been further objected by the counsel for the city that the laws are in conflict with section 1, of amendment 14, of the Constitution of the United States, prohibiting the State from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The only part of this section which by any possibility could be relied upon by way or argument to defeat the application, is that contained in the last branch of the sentence. But neither of these statutes has denied to any person within the jurisdiction of the State the equal protection of its laws. No citizen is deprived of any right or privilege constitutionally secured to him by reason of those laws. A preference only for official em-

ployment has been given to honorably discharged soldiers and sailors as a reward for meritorious service performed by them during the war by which the Union was sustained and the rebellion suppressed.

So far as the laws extend, there seems to be no constitutional objection against their validity, and no officer or appointing power—as these words have been employed by the statutes of 1886—has authority to deny this preference to the class of persons who are brought within the provisions of these statutes. And where the proceeding may be such as arbitrarily to deny the privilege secured by these statutes a mandamus would be the appropriate remedy to enforce the performance of the duty (*People* v. *Leonard*, 74 N. Y. 443). And authority for its allowance has been secured by sections 2068 and 2070 of the Code of Civil Procedure.

But a radical defect appears in the petition preventing the success of the applicant's motion, for it has nowhere been stated that the fact that he was an honorably discharged Union soldier of the war of the rebellion had been brought to the attention of the common council before it took its action upon the selections or appointments of the street commissioner of the street inspectors. It has been stated in the petition that this fact has been brought to the knowledge of the commissioner himself and it rightly, on that account, influenced his action. But the petition does not show that knowledge of this fact was communicated to the common council. All that is stated upon this subject is that the commissioner communicated and transmitted to that body his appointment of the petitioner as health and street inspector. This was very far from apprising that body of the fact that he had been selected and appointed, or was entitled to be, under the laws securing to him this preference as a discharged Union soldier.

Without notice of that fact the common council was authorized and empowered to proceed with the consideration of the case precisely the same as though the fact itself did not exist, and to reject his selection and appointment under the authority of the charter, rendering it dependent upon the advice and consent of the common council. On this account the application of the petitioner must fail, and the motion for the writ of mandamus will be denied.

3. Political Qualifications.

ATTORNEY GENERAL V. THE BOARD OF COUNCILMEN.

Supreme Court of Michigan. October, 1885.

58 Mich. 213.

CAMPBELL, J. The Attorney General applies for a mandamus to compel the respondents to take action upon certain nominations made by the mayor of Detroit of four persons, two being Republicans and two being Democrats, to act as a "Board of Commissioners of Registration and Election" for the city of Detroit. Respondents refused to consider the nominations because they regarded the statute which provides for such board as unconstitutional and invalid. To an order to show cause they interpose that ground of defense. No other question is of much importance in the case.

. . . . . .

. . . . . The new statute undertakes to provide a Board of Commissioners to appoint ward registers and inspectors who are to perform the duties formerly imposed on the boards made up of aldermen and their appointees and of persons elected by the voters. The board thus provided for is required to be composed of four members holding office for four years, the first board being appointed for one, two, three and four years respectively, so that one vacancy shall be filled each year. They are all to be resident electors of the city, and "two members thereof to be from each of the two leading political parties in the said city."

. . . . . .

It is . . . . . a most important prineiple under our constitutional system, that no one shall be affected in any of his legal and political rights by reason of his opinions on political subjects or other matters of individual conscience. The political right to freedom of belief and expression is asserted in the most distinct way, and applies to every privilege which the constitution confers. No one has ever supposed that any new condition could be added to those which the Constitution has imposed on the right of suffrage, beyond such as are necessary to guard against double voting, or to prevent its exercise by those who are not legal voters. The only legitimate object of registration laws is to secure a correct list of actually qualified voters. Any

attempt to inquire into the sentiment of voters is not only an abuse, but one which it is the chief purpose of the ballot system to prevent. The ballot is a constitutional method which cannot be changed, and its perpetuation means the security to vote without any inquisition into the voter's opinion of men or measures. And it would be entirely meaningless if the voter's choice of candidates for any office must be made from any particular party or number of parties. But the constitution has made this more specific (although this was hardly necessary), by providing, after giving the form of an official oath, that "no other oath, declaration or test shall be required as a qualification for any office or public trust."

It is manifest that every important function of government comes under one or the other of these heads of office or public trust. The board of registration commissioners consists, under this statute of persons holding permanent offices. The district registrars, clerks and inspectors perform functions connected with the most vital and important action of citizens in their capacity as choosers of the officers of government. The constitutional rule covers them all, literally as well as impliedly.

It was urged in the argument that if the term *test* can be held applicable to inquiries into party affiliations, it is equally applicable to those other qualifications often required for public service, such as education, scientific acquirements in surveyors and other specialists, legal knowledge in law officers, and the like. But this is not so. Not only is it evident from the other provisions in this clause that all of the exemptions referred to are such as would be applicable in all sorts of offices, but the use of the word *test* is especially significant because its recognized legal meaning in our Constitution is derived from the English Test Acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding of framers of constitutions. If this were not so, and if the power of the legislature in imposing conditions of office is at the same time only restrained by express clauses applying in terms to officers and to no one else, it would not be difficult for any dominant party controlling the legislature to perpetuate its power until overthrown by revolution. But such discriminations are as repugnant to the rights of voters in selecting as to the rights of those chosen in assuming office, and this clause is but an additional assertion of a principle found in other parts of the Constitution, expressed or clearly implied.

In the case of *People* v. *Hurlburt,* 24 Mich. 44, it was not disputed by any of the judges who referred to the matter, that it would not be lawful to confine the choice of officers to particular parties, although two of the judges thought that the provision in that particular case was capable of being eliminated from the statute. And it is claimed in the present case that the present law is declared and intended to be non-partisan, and that the board may be chosen without reference to this restriction of party membership.

It is altogether likely that the framers of the law were of opinion that the evils of partisan action and the temptation to carry it to abusive extremes would be lessened by requiring that one party should not monopolize the offices but that two should share them. No one can doubt the advantage of impartiality in public action. But parties, however powerful and unavoidable they may be, and however inseparable from popular government, are not and cannot be recognized as having any legal authority as such. The law cannot regulate or fix their numbers, or compel or encourage adherence to them. Many good citizens form no permanent party ties, and when elections are close the effort of each party is to detach votes from the friends of the other. Where there are two parties larger than any others, the success of either is very often gained by coalition with a third one. In local matters party allegiance is not uncommonly laid aside for the time being so that it cannot be said that any party is represented in the election. However well meant such a statute as that before us may be, it distinctly makes party adhesion a condition of office, and not only so, but it puts all but the two favored parties beyond the possibility of representation, if the law is obeyed.

It is equally clear that this party representation is the essential purpose of the law, and that the other changes are merely subsidiary. There are some changes in detail, but the main purpose cannot be mistaken. The partisan qualifications are made emphatic in regard to all the officers. It is impossible for any candid person to read the act and believe that the real legislative design can be carried out by leaving the mayor and councilmen at liberty to choose commissioners from a single party, or for the commissioners to appoint registrars and inspectors without distinction of party at their pleasure. And it would need no great sagacity to see that if such unlimited power were vested in a body made up as this body might then be constituted, all of the old evils would

remain, and would be made worse by the absence of any responsibility to the voters of the precincts.

In my judgment the creation of a board with such powers as are given to this board is quite as serious an infringement of the constitution as the partisan clauses, and much more dangerous.

. . . . . .

As the defects which have led to a refusal of a mandamus in this case invalidate the whole law, there is no occasion to consider anything else. In my opinion either of them is fatal.

CHAMPLIN and SHERWOOD, JJ., concurred.

MORSE, C. J., delivered concurring opinion.

ROGERS V. COMMON COUNCIL.

Court of Appeals of New York. October, 1890.

123 N. Y. 173.

. . . . . .

This action was brought by plaintiff, as a tax-payer of the city of Buffalo, to restrain the defendants, the common council and mayor, etc., of said city, from authorizing, drawing or paying any warrant for the salary of the defendant. Ceriac Diebold, as street and health inspector of the city of Buffalo, on the ground that his appointment was in violation of the civil service law and of the rules prescribed thereunder by the mayor of said city.

PECKHAM, J.

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The defendant alleges that the acts are unconstitutional because among other reasons they provide for the appointment by the governor, and for the confirmation by the senate, of three persons as state civil service commissioners, not more than two of whom shall be adherents of the same party. This last provision preventing the formation of a civil service board of commissioners from one political party is cited as a violation of article 1, section 1 of our constitution which declares that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or judgment of his peers." The provision is also claimed to be a violation of that part of section 6 of article 1, which declares

that no person shall be "deprived of life, liberty or property without due process of law." Provisions of a nature similar to this act are contained in numerous statutes, which have been enacted since the adoption of our constitution. Among the latest are those creating the state railroad commission and the state board of arbitration. In appointing such commissioners the governor is not permitted to take them all from one party. None of these statutes has been held unconstitutional, and so far as I can discover this provision has never been assailed as a violation of the constitution. It is not conclusive of course, yet the fact that up to this time no such claim has been made in any legal discussion, while statutes containing provisions of this kind have been frequent, is something of an argument in favor of their validity.

We feel quite clear that such provisions are not in violation of the first section of article 1 of the constitution. A citizen is not, within the meaning of this section, in such a case disfranchised, nor is he deprived of any rights or privileges secured to any other citizen of the state. No definition that could be given would probably include all the cases that such section might cover, and it is never well to attempt a general definition in matters of this nature. It is enough to say as each case presents itself that it is or is not included within the section.

The claim of defendant upon the facts of this case is that after two persons have been appointed from one political party, the legislature has no right to direct that in appointing a third, as one of three commissioners, such appointment must be made from some other than the same political party that furnished the other two. It is urged that the legislature has no right, because the applicant for the third appointment might be a member of the same political party as the two already appointed, and that he has a constitutional right to be eligible for such appointment, and any statute which stands in the way of such right(save as a punishment for crime or as a consequence of a conviction thereof) must deprive him of the franchise or privilege of eligibility to office, and, therefore, amounts to his prescription to that extent, and is for that reason a violation of the constitution. We think not.

The appellant bases his argument upon the proposition that every citizen has a right, which is protected by the constitution, to be regarded as eligible to hold any office, unless the constitution has itself prescribed certain qualifications for such holding. He then asserts that the statute in question violates this constitu-

tional right. It is not necessary in the view we take of this statute, to decide upon the correctness of the claim as to the eligibility of the citizen to hold office as made by the appellant under the provisions of the constitution. We will, simply for the purpose of this discussion, assume it to be correct. But we do not think that this statute violates any constitutional right of the individual.

We think his right to be regarded as eligible to hold office under this statute is fully recognized when he stands on an equal footing with others of his class, all of whom are eligible. Where there are two offices, which members of the same party may fill, if he being a member of such party, is equally eligible with any other member of that party to fill either, his constitutional privilege to hold office is fully recognized and vindicated. It must be remembered that there is nothing in this statute which compels the appointment of even one member of any political party. It simply prevents the appointment of more than two from such party.

With the appointment of a third another condition arises, and that condition prevents the selection being made from the ranks of the same political party from which the other two appointments have been made. Having been a member of the eligible class from which the other two persons were selected, and having thus had his constitutional chance of appointment equally with all others of that class, all being eligible, we cannot think that while two others from his class have been taken, and consequently he has been omitted in the two appointments, his eligibility for holding office extends by virtue of this section of the Constitution to the right of appointment as the third member of said commission in spite of the condition limiting the appointment to two from any one political party. In such case it cannot be truly said that the eligibility to hold office depends upon party affiliation. The purpose of the provision is, of course, plain. It seeks to secure the appointment of persons who are not all of the same political views, and thus to provide for a representation in the body so appointed, of different and probably conflicting interests in the state. We cannot believe that the section in question does or was intended to operate so as to prevent the execution of such a purpose so carried out.

. . . . . .

But, in our judgment, legislation which creates a board of commissioners consisting of two or more persons, and which provides that not more than a certain proportion of the whole number of commissioners shall be taken from one party, does not amount to

an arbitrary exclusion from office nor to a general regulation requiring qualifications not mentioned in the constitution. The "qualifications" which were in the mind of the learned chancellor were obviously those which were, as he said, arbitrary, such as to exclude certain persons from eligibility under any circumstances. Thus a regulation excluding all physicians would be arbitrary. But would a regulation which created a board of health and provided that not more than one physician from any particular school, or none but a physician should be appointed thereon, be arbitrary or unconstitutional as an illegal exclusion from office? I think not.

The purpose of the statute must be looked at, and the practical results flowing from its enforcement. If it be obvious that its purpose is not to arbitrarily exclude any citizen of the state, but to provide that there shall be more than one party or interest represented, and if its provisions are apt for such purpose, it will be difficult to say what constitutional provisions is violated, or wherein its spirit is set at nought.

The case is entirely different from that of *Attorney-General* v. *City of Detroit,* 58 Mich. 213. . . . . .

In our judgment there is nothing in the first section of article 1 which invalidates this legislation. It is equally apparent that the statute does not violate the provisions of section 6, of the same article, prohibiting any person from being deprived of life, liberty or property without due process of law. He is not deprived of his life or his property by this statute. Giving the widest definition to the word "liberty" as including the right to be eligible to hold office, the discussion already had shows that it has not been disregarded under this law.

Another objection to the validity of the statute is stated by the appellant. He says the statute violates article 10, section 2, which provides that "All city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be selected by the electors of such cities, towns or villages, or of such division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose." His argument runs in this manner: The statute provides that the mayor shall provide general rules under which city officers are to be selected, which shall go into effect when approved by the state civil service commission. The powers of the local authorities to select city officers are, therefore, as he argues, subordinated to the power of the state authorities. We think the proposition cannot be maintained. The

powers of the local authorities to select city officers, within the meaning of this section of the constitution, are not subordinated to those of the state authorities by the mere necessity for the submission of the regulations concerning their appointment to the state board. The statute provides that the mayor is to prescribe such regulations for the admission into the civil service as will best promote the efficiency thereof and ascertain the fitness of candidates in respect to character, knowledge and ability for the branch of the service into which they seek to enter. These regulations are to take effect upon the approval of the state commission. The mayor has in the first instance the sole right to prescribe regulations, but they are to be such as shall best promote the efficiency of the service, and ascertain the fitness of the candidates. The submission of such regulations to a state board before they are to take effect, does not interfere with the general powers of the local authorities to appoint to office. The state board cannot itself make the regulations or alter them. The regulations themselves can only be for the purpose of establishing efficiency and ascertaining the fitness of candidates. The same local authorities are to make the appointments that did so before the statute was passed. Means are simply taken to insure the appointment of fit and capable persons. The general plan provided in the statute would seem to be a fit and appropriate one for the purpose of accomplishing that result.

It is not denied that illegal or improper regulations may possibly be prescribed by the mayor and approved by the commission. This fact does not affect the validity of the statute. The rule or regulation which is alleged to be invalid may be brought before the court by some person whose rights have been affected thereby, and judgment may be thus given in regard to such validity. The defendant, Diebold, does not show that he has lost any right or that any right of his has been injuriously affected by any regulation adopted by the mayor and approved by the state commission, and he cannot, therefore, be heard upon a question which is, as to him, a mere abstraction.

Still another ground of invalidity is alleged by the appellant. He says that the statute conflicts with article 12, which provides for the taking of an oath of office by members of the legislature and all officers, executive and judicial, before they enter on the duties of their respective offices, which oath is therein set forth, and it is there stated that "no other oath, declaration or test shall be required as a qualification for any office of public trust."

The statute by which an applicant for appointment to a position in a public office is made to show his fitness therefor is claimed to constitute an illegal test within the meaning of this section. It is said that the legislature has no right to enact that a person who shall be appointed to a public office shall have the qualifications necessary to enable him to discharge the duties of such office, nor to provide that the faet that he does possess such qualifications shall be ascertained by a fair, open and proper examination. Nothing but the bare oath mentioned in the Constitution can be asked of any applicant for an appointive office is the claim of the appellant. We do not think that the provision above cited was ever intended to have any such broad construction. Looking at it as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a Constitutional barrier to the right of the people through their Legislature to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office. So long as the means adopted to accomplish such end are appropriate therefor, they must be within the legislative power The idea cannot be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own representative as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in public office. No law involving any test other than fitness and ability to discharge the duties of the office could be legally enaeted under color of a purpose to ascertain or prescribe such fitness. Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of these qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office are not dangerous in their nature, and in their execution they are not liable to abuse in any manner involving the liberties of the people.

Most, if not all, of the provisions of the federal and state constitutions, which are of the nature of a bill of rights, were placed therein with reference to English history and the struggles of liberty which such history recorded. Declarations, oaths and tests as a condition for holding office had been frequently resorted to by the parliament of Great Britain for the purpose of promoting the prosperity of one religion or insuring the downfall of another.

. . . . . .

The federal Constitution has declared that "no religious test shall ever be required as a qualification to any office or public trust under the United States." That provision undoubtedly was inserted for the same reasons which led to the insertion of the somewhat similar one of our state constitution, and now under discussion. Its meaning has not been judicially stated that I am aware of, but we have the opinion of Mr. Justice Story that it was aimed to prevent the tests prescribed by such English statutes as I have above referred to. 2 Story on Const. Secs. 1847, 1849.

In this case we simply hold that the imposing of a test by means of which to secure the qualifications of a candidate for an appointive office, of a nature to enable him to properly and intelligently perform the duties of such office, violates no provision of our constitution.

Some other grounds have been urged for a reversal of this judgment, but after a careful examination of them we think they are not tenable for the reasons already sufficiently stated in the opinions of the courts below.

The judgment herein should be affirmed, with costs.

All concur, RUGER, Ch. J., in result.

Judgment affirmed.

II. WHEN QUALIFICATIONS MUST BE PRESENT.

SMITH V. MOORE.

Supreme Court of Judicature of Indiana. May, 1883.

90 Ind. 294.

ZOLLARS, J. This case presents for decision a novel, and somewhat difficult question, involving, as it does, the proper construction and application of section 16, article 7, of the state constitution.

Upon proper request, the trial court made a special finding of facts.

So far as they need to be set out in this opinion they are substantially as follows:

At the general election in 1880, appellee was duly elected for his first term, treasurer of Benton county for the period of two

years, from and after August 15, 1881, was commissioned, duly qualified, entered upon the discharge of the duties of the office, and was so serving at the time of the general election in 1882.

At this last election appellant, appellee, and one Finly were candidates for the office of treasurer of Benton county, for the term of two years, to commence on August 15, 1883.

Appellant received a majority of all the votes cast, which was duly certified by the proper board of canvassers.

At the April election in 1878, appellant was elected a justice of the peace in and for York township, in Benton county, for the term of four years, commencing on the 29th day of November, 1878, was duly commissioned, qualified, and was discharging the duties of the office at the time of the general election in 1882.

At the April election in said York township, in 1882, appellant, with his knowledge and consent, was voted for, for the office of justice of the peace for the term of four years, commencing on the 29th day of November, 1882, and received 127 votes, being the whole number of votes cast for that office.

Proper returns were made of this election. On the 18th day of April, the Governor issued a commission to appellant as such justice for a term of four years, from and after the 29th day of November, 1882.

This commission was forwarded to the clerk of the circuit court, where it still remains, appellant never having accepted the same, given bond, or in any way qualified or entered upon the duties of the office for the term so to commence on November 29, 1882.

On the 27th day of November, 1882, appellant notified the clerk in writing that he refused to accept or qualify for the second term as justice of the peace.

The court below found as conclusions of law upon these facts:

First. That on the 7th day of November, 1882, appellee was eligible to the office of treasurer of Benton county, for the term to commence on the 15th day of August, 1883.

Second. That appellant on November 7, 1882, was not ineligible to election to said office of treasurer for the term to commence on the 15th day of August, 1883, by reason of his first election, commission and qualification as such justice of the peace from November 29th, 1878, to November 29th, 1882.

Third. That appellant was ineligible to election on November 7th, 1882, to the office of county treasurer, for the term commencing August 15th, 1883, by reason of his second election as

such justice of the peace for the term of four years, from November 29th, 1882.

Fourth. That, by reason of appellant's ineligibility, appellee was elected and entitled to the office of treasurer of the said county, for the said term, commencing on the 15th day of August, 1883.

Judgment was rendered accordingly declaring appellee, who was the contestor, entitled to the said office of treasurer. From this judgment appellant prosecutes this appeal.

The section of the constitution above referred to is as follows:

"No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office."

Appellant contends that the ineligibility refers to the right and fitness to be inducted into, and discharge the duties of, an office other than a judicial one, and that the term elected has reference not merely to receiving a majority of votes, but also the acceptance of the office.

And that, hence, although appellant may have been ineligible on the day of election, 1882, by reason of his term of office as justice not having expired, yet, the ineligibility was removed by the expiration of that term on the 29th day of November, 1882, and he might rightfully and legally take and hold the office of treasurer, for the term to commence in August, 1883.

And that, although appellant was, by the proper vote, at the April election, 1882, chosen for a second term as justice, not having filed the bond or taken the oath required by law, he was not by such election rendered ineligible to the office of treasurer.

On the other hand, it is contended by appellee that the ineligibility has reference to the right to be voted for, and that as the term for which appellant had been elected a justice of the peace in 1878 had not expired on the day of election in November, 1882, all of the votes cast for him counted for nothing, and that the subsequent expiration of said term did not render him eligible to the office of treasurer, the term of which did not commence until August, 1883. And further that, having, with his knowledge and consent received the votes for the office of justice of the peace in April, 1882, and having received a majority of the votes, he was elected, and thus rendered ineligible for four years to hold the office of county treasurer, although he declined the commission, and refused to file a bond, take the oath, or accept the office of justice of the peace.

These conflicting positions are maintained with much learning and ability by the counsel for the respective parties.

After a careful and full examination, we have reached the conclusion that the position of appellant is the correct one in this case, and that the court below erred in its conclusions of law, so far as they relate to the ineligibility of appellant.

"Legally qualified" is the meaning that should be given to the word eligible, as used in the section of the constitution under consideration.

"Office" has been defined to mean public employment, and in legal meaning to be, an employment on behalf of government in any station of public trust; a place of trust by virtue of which a person becomes charged with the performance of certain public duties. 5. Wait's Actions and Defenses, p. 1 *et seq.*, and authorities cited. With this definition of the words "eligible" and "office," the constitutional provision may be read as follows: No person elected to any judicial office shall, during the term for which he shall have been elected, be legally qualified to be employed on behalf of government in any station of public trust, other than a judicial office. In other words, be legally qualified as an officer, to perform the duties of a public officer, other than judicial.

This interpretation disposes of one branch of the case, viz., the alleged ineligibility of appellant on account of his term as justice, which expired on the 29th day of November, 1882, more than eight months before the beginning of the term of office as county treasurer, for which he received a majority of the votes at the November election, in 1882.

When appellant entered upon his term as justice of the peace on the 29th day of November, 1878, he became, during the continuance of that term, disqualified to hold and perform the duties of any public office, except a judicial one. But while he could not, during that term, hold or perform the duties of a public office, other than judicial, it does not follow that he might not, during that term, be legally voted for and chosen to an office, the term of which would not begin until after the expiration of the judicial term as justice. Suppose that the judicial term had ended on the 8th day of November, 1882. . . . . could it be said with reason that appellant might not have been voted for, and legally chosen to the office of county treasurer for a term to begin in August, 1883? If so, then the office of justice of the peace disqualified him from holding and performing the duties of that office, not only during the term for which he was elected a justice

of the peace, but for almost two years after the expiration of that term. Such a construction would make the constitution read that no person elected a justice of the peace shall, during the term for which he shall have been elected, be eligible to be voted for for any office, except a judicial one. Such a construction, we think, is not compatible with sound reason nor a proper interpretation of the constitution.

We are cited by appellee's counsel to a number of authorities, which, they contend, support their interpretation of the constitutional provision. The questions for decision in the case at bar are before this court for the first time, and hence, so far as this court is concerned, we are upon untrodden ground. Isolated expressions are found in some of the earlier cases, but they will be found to be purely *dicta*, so far as they in any way bear upon the questions in this case. They were not necessary to the decision of the questions before the court, and were evidently made without any thought of deciding or intimating a decision of the questions here involved.

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Section 2, article 6, of the state constitution, provides that no person shall be eligible to the office of clerk more than eight years in any period of twelve. Here the phrase "eligible to office" has reference to the qualification to hold the office, and not to the election; hence it has been held that while a person might properly be elected, he could not hold beyond the eight years. *Carson* v. *McPhetridge*, 15 Ind. 327. And, so, "eligible to any office," as used in the section of the constitution under consideration in this cause, has reference to the qualification to hold office, and not to the choosing or election to such office.

We conclude, therefore, that the term for which appellant was elected a justice of the peace in 1878, having expired on the 29th day of November, 1882, he was and is qualified to hold the office of county treasurer, the term of which commenced on the 15th day of August, 1883, and that, having received a majority of the votes for such office at the general election in 1882, he is entitled to the office.

It is insisted, however, that the court below so decided, that appellant is disqualified for the office of county treasurer because, at the spring election in his township in 1882, he was voted for, and received a majority of the votes for the office of justice of the peace, the term to begin on the 29th day of November, 1882, although he did not accept the commission, file a bond, take the

oath, or in any way accept such office, but declined it. We cannot adopt this view. . . . . As we have seen, the provision of the Constitution under consideration provides that "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office," etc.

The language of the section is not, that a party shall be ineligible during the time for which he shall have been elected, but during the *term* for which he shall have been elected. This, we think, implies that there shall be a term by which the ineligibility shall be measured, and that the term in contemplation begins, and can only begin, with the acceptance of the office by proper qualification. It is contended, on one side, that the purpose of the convention in the adoption of this provision was to insure a stable judiciary; that by thus rendering the judges ineligible, the result is to keep them in their places during the term for which they may have been elected. On the other side, it is insisted that the purpose was to keep the judges of the courts free from political alliance, and prevent them using their positions as a means of acquiring other offices. Judging from the debate we might conclude that the convention had both objects in view. However that may be, the section, without a doubt, was meant to apply to judges in office, and not to persons who may be chosen simply, but never qualify or enter upon the discharge of official duties. In order, then, to carry out the purpose and full intent of the section, the word "elected," used therein, cannot be taken in the narrow sense contended for by appellee, but must be construed to include, not only being chosen to, but an acceptance of, the office.

Let us suppose that A and B are rival aspirants for an office not judicial. In order to render B ineligible to that office and thus to dispose of him as such rival, A procures the voters of B's township to vote for him for the office of justice of the peace. Having received a majority of the votes, A contends that B is elected to that office, and, without accepting or qualifying, is rendered ineligible to the other for the period of four years. Such a contention on the part of A would strike the common understanding as entirely untenable and unreasonable. Nor could it make any difference whether such election might be with the knowledge and consent of B or without his knowledge.

An office is not obtained or held by contract. McCrary on Election, 216; Pomeroy Const. Law, sec. 547. It cannot be said, with reason, that such consent to be voted for is in any sense an ac-

ceptance of the office. Until the consenting party is known to have received a majority vote there is nothing for him to accept. If being voted for and received a majority of the votes is an election, in the sense in which the word "elected" is used in this section of the constitution, it can make no difference whether such votes are cast with or without the knowledge and consent of the party voted for. To say that if the votes are cast with the knowledge and consent of the party voted for, he is thereby elected, and if, without such knowledge, he is not elected, is to depart from the literal signification of the word "elected," as contended for by appellee. To adopt this view, it would become necessary to construe the word "elected", and make the constitution read: No person elected, with his knowledge and consent, to a judicial office, shall be eligible, etc. And further, it would impose upon the courts, in every case of contest like this, under this section, the unreasonable and difficult duty of deciding whether or not the party thus elected was voted for, with his knowledge and consent. Other questions are argued by counsel, but it will not be necessary for us to consider them.

Without further extending this opinion, we hold that appellant was eligible to the office of county treasurer to which he was chosen, is entitled to it, and that the court below erred in its conclusions of law. The judgment of the trial court is, therefore, in all things reversed, at the costs of appellee, and the cause remanded, with instructions to that court to make its conclusions of law, and render judgment in accordance with this opinion.

HAMMOND, J., was absent during the consideration of this cause.

Dissenting opinion by ELLIOTT, J.

There is conflict on this point, quite a number of cases holding that qualifications for elective offices must be present at the time of election. See Searcy v. Grow, 14 Cal. 117; Parker v. Smith, 3 Minn. 240; State v. McMillen, 23 Neb. 385.

III. Disqualification.

ATTORNEY-GENERAL V. MARSTON.

Supreme Court of New Hampshire. June, 1891.
66 N. H. 485.

Quo warranto, to determine the defendant's title to the office of selectman of Durham. The defendant having held the office of tax-collector of Durham in 1888 and 1889, and being re-elected at the annual meeting in March, 1890, took the official oath and served for the political year. For the present year no successor was elected, and T. W. Schoonmaker being appointed, was sworn, and is collector. At the annual meeting in March, 1891, the defendant was elected selectman and being sworn, he is serving in that office. On the tax lists of 1888 and 1889 there are uncollected taxes amounting to about $169, and on the lists of 1890 about $200. Since the last March meeting the other selectmen requested a list of these uncollected taxes, and he furnished it; and in an examination made of it by the board, he told his associates that he thought some of the taxes of 1890, amounting to $61.95, could not be collected, and would probably have to be abated. He has not resigned the office of collector unless his acceptance of the office of selectman is a resignation, and his liability in respect to the uncollected taxes of the three years has not been discharged or adjusted.

Clark, J. "Neither the treasurer nor the collector of taxes shall be a member of the board of selectmen." G. L., c. 40, s. 5. The duties of the offices of collector and selectman are in some respects conflicting. The collector is required to give a bond to the acceptance of the town or selectmen. G. L., c. 42, s. 4. The selectmen may remove a collector for certain causes. G. L., c. 42, s. 9. And in certain cases they have power to issue an extent against him. G. L. c. 66, s. 5. And it is the duty of the selectmen acting in behalf of the town, to see that the collector faithfully performs his official duties, and in default to take measures to protect the interests of the town.

The defendant having been elected and having served as collector for the years 1888, 1889 and 1890, and still retaining his warrants and lists, upon which are uncollected taxes, is still collector for those years. "Every collector, in the collection of taxes committed to him to collect, and in the service of his warrant, shall have the powers vested in constables in the service of civil process,

which shall continue until all the taxes in his list are collected." G. L., c. 58, s. 1.

The defendant's acceptance of the office of selectman did not relieve him from the office of collector. The acceptance of an office by one disqualified to hold it by reason of holding an incompatible office is not necessarily a resignation of the prior office, unless it is made so by special statutory or constitutional provision. Const. Part 2, arts. 94, 95. The defendant's resignation would not divest him of the office of collector unless it was accepted. G. L., c. 42, s. 1, provides that in case any officer who has given an official bond shall resign, he and his sureties shall continue liable upon his bonds for all acts under color of his office until he shall resign, and his resignation shall have been accepted by the town, selectmen, or others competent to accept the same.

The defendant being a collector of taxes for the town of Durham when he was elected a selectman, was disqualified to hold the office, and his election gives him no title to it. *Cotton* v. *Phillips*, 56 N. H., 220, 223.

Having assumed the office of selectman under color of an election, Marston is an officer *de facto*, and his official acts are valid as to third persons.

Judgment of ouster.

DOE, C. J., did not sit: the others concurred.

PEOPLE EX REL. RYAN V. GREEN.

Court of Appeals of New York. September, 1874.

58 N. Y. 295.

Appeal from order of the General Term of the Court of Common Pleas for the city and county of New York, affirming an order of special term directing a writ of peremptory *mandamus* to issue.

An alternative writ was issued alleging, in substance, that the relator was, on or about May 1st, 1870, duly appointed deputy clerk of the Court of Special Sessions for the city and county of New York at a salary, as fixed by law, of $5,000 per annum, which office he has continued to hold and still holds; that he presented his claim for salary for the months of February, March, April and May, 1873, to the defendant which the latter refused to pay.

The return to the writ simply alleged that, subsequent to the appointment of relator, in the year 1872, he was duly elected a member of the legislature, which office he accepted and entered upon the performance of its duties, and was engaged in such performance, in the city of Albany, during the months of February, April and May, thus rendering it impossible to perform the duties of the said office of deputy clerk which required his personal presence in the city of New York, and that he did not perform the duties of the latter office during those months.

Upon the writ and the return an order was granted directing the issuing of a peremptory writ, notwithstanding the return, directing the payment of the salary.

FOLGER, J.

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The point made by the appellant, that section 114 of the last charter of the city of New York (Laws of 1872, chap. 335, p 519) operates to vacate the office of deputy clerk, held by the relator, is not tenable. The language of the section is prospective. A law may not operate upon existing rights and liabilities without it in terms expresses such intention. *Johnson* v. *Burrell*, 2 Hill, 238. Though there is no vested right to an office, which may not be disturbed by legislation, yet the incumbent has, in a sense, a right to his office. If that right is to be taken away by statute, the terms should be clear in which the purpose is stated. This section is quite otherwise, if it has such purpose.

Nor is the office of a member of assembly, in the legal sense of the word, incompatible with that of deputy clerk of the Court of Special Sessions of the city and county of New York. After the exhaustive opinions delivered in the court below upon this point, it would be an unwarrantable use of time to go over the ground again, so well explored in them. It may be granted that it was physically impossible for the relator to be present in his seat in the assembly chamber, in the performance of his duty as a member of that body, and at the same time at his desk in the court doing his duty as deputy clerk thereof. But it is clearly shown in those opinions, that physical impossibility is not the incompatibility of the common law, which existing, one office is *ipso facto* vacated by accepting another. Incompatibility between two officers, is an inconsistency in the functions of the two; as judge and clerk of the same court-officer who presents his personal account subject to audit, and officer whose duty it is to audit it. The case of *Bryant*, 4 T. R. 715, and 5 id. 509, cited by appellant does not conflict with

this view. It was decided upon the meaning of the particular statute, which required the personal presence of the officer at the prison. Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter, is, that from the nature and the relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must be subordinate, one to the other, and they must, *per se*, have the right to interfere, one with the other, before they are incompatible at common law. For the authorities sustaining these views, we refer to the opinions in the court below, where they are laboriously collected.

It is not claimed that there is an express incompatibility created by the constitution, or by statute, other than that above referred to.

The appellant makes the further point, that the alternative writ makes no averment that the account of the relator for his salary has been audited by the board of supervisors and by the auditor of the finance department, and that the proper voucher therefor has been examined and allowed by the proper officer and approved by the comptroller.

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We are of opinion that the lack of the averments in the alternative writ is fatal to the relator's application.

It follows, that the order appealed from must be reversed.

All concur.

Order reversed, and motion for peremptory mandamus denied.

ATTORNEY GENERAL EX. REL. MORELAND V. COMMON COUNCIL OF CITY OF DETROIT.

Supreme Court of Michigan. March, 1897.

112 Mich. 145.

Mandamus by Fred A. Maynard, Attorney General, on the relation of Dewitt H. Moreland, to compel the common council of the city of Detroit to call an election to fill a vacancy in the office of mayor. Submitted March 17, 1897. Writ granted March 19, 1897.

HOOKER, J. Hon. Hazen S. Pingree was elected mayor of the city of Detroit, and while an incumbent of that office was elected to, accepted and entered upon the execution of the duties of the office of governor. He continues to perform the functions of both, and the petition in this proceeding proceeds upon the theory that, by accepting the latter office, that of mayor has become vacant, and a writ of *mandamus* is asked commanding the respondent to call an election to fill such vacancy. Two theories are presented under which it is contended that Mr. Pingree cannot hold these two offices at one and the same time:

1. That he is prohibited by section 15 of article 5 of the Constitution, which says: "No member of Congress, nor any person holding office under the United States or this State, shall execute the office of governor."

2. That the two offices are incompatible under the rules of the common law.

Many cases have arisen upon similar provisions of the various constitutions, and, while the decisions are not altogether uniform, we shall find them in substantial harmony upon two propositions, viz.: *First*, that an officer of a city, whose duties are simply and purely municipal, and who has no function pertaining to state affairs, does not come within the constitutional description of officers holding office under the State; and, *second*, where officers in cities are appointed or elected by the community in obedience to laws of the State which impose duties upon them in relation to State affairs, as contra-distinguished from affairs of interest to the city merely, such as relate to gasworks, sewers, waterworks, public lighting, etc., they are upon a different footing, and may properly be said to hold office under the State. We will first consider whether this distinction is a proper one to be made under our constitution, and it must be determined upon adjudicated cases else-

where, and such lights of a domestic nature as our own decisions and discussions afford.

There are cases which hold that a similar provision is to be applied only to constitutional offices, and it is contended here that, at the most, the provision does not include all offices that are held under State authority; that officers elected by counties, townships, school districts, etc., should be excluded.

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. . . . . There was in the convention no apparent disagreement as to the proposition that section 8 of article 4 of the Constitution 1835 excluded others than those who were "appointed directly by state authority," nor is it easy to perceive why there should have been. In the same instrument (article 6, section 6) it was provided that each township might elect four justices of the peace. It is perfectly obvious, therefore, that if the words "office under the United States or of this state" were given a construction which limited them to "officers appointed directly by state authority," the exception, in the same section, of justices of the peace, was senseless; and as the words are susceptible of a construction which excluded officers mediately holding office under authority of the State, and administering State functions, it is to be assumed that they were employed in that sense. It is also plainly inferable that, if the words were used in this sense in the section referred to, similar words were used in a like sense in section 16, art. 5, which reads: "No member of Congress, nor any other person holding office under the United States or this State, shall execute the office of governor,"—a provision in the same language as is employed in section 15, art. 5, of our present Constitution.

It should, perhaps, be stated that the question cannot well arise under the corresponding provision of our present Constitution relative to the qualifications of members of the legislature (article 4, section 6), as the inhibition contained in that section, as appears by the Constitution, actually adopted by the convention, signed by the members of the convention, and filed in the office of the secretary of state, does not apply to State officers; the words "or this State" having been omitted, whether intentionally or through inadvertence it is impossible to say. Certain it is that the vote adopting the Constitution was taken upon the engrossed copy, as appears by the proceedings of the convention (page 918).

In California, the constitutional provision was that "no person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under

this State," etc. In *People* v. *Leonard,* 73 Cal. 230, the office of supervisor of a district was held to be prohibited.

The Indiana constitution prohibited the holding by one person at the same time of two lucrative offices under the State, and was held to cover the office of county commissioner and county recorder. *Daily* v. *State,* 8 Blackf. 329. In *Foltz* v. *Kerlin,* 105 Ind. 221 (55 Am. Rep. 197), a township trustee was held to be within the provision.

In Virginia the Code provides that "no person shall be capable of holding any office of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of this commonwealth," who holds certain other offices enumerated. *Bunting* v. *Willis,* 27 Grat. 144 (21 Am. Rep. 338), and *Shell* v. *Cousins,* 77 Va. 328, involved the office of sheriff which is a county office, and, in the latter case, a "sampler of tobacco," in the city of Petersburg. These offices were held to be within the prohibition.

Shelby v. *Alcorn,* 36 Miss. 273 (72 Am. Dec. 169), held, under a provision prohibiting the appointment of a senator to "any civil office under the State which shall have been created during his term as senator," that a senator was not eligible to the office of levee commissioner of a county.

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These cases proceed upon the theory that all officers whose duties are prescribed by general law, however trivial, perform their own particular portion of the business of the State. The levying and collection of taxes are State matters. So are all things connected with the State system of schools, construction and maintenance of public highways, and preservation of the peace, and these cases hold the generally conceded doctrine that all who have parts to perform in the general scheme are officers holding under the State, if their engagement rises to the dignity of an office, rather than a mere employment.

The next distinction made relates to municipal offices, and it is said that officers elected in cities are not to be classified with county and township officers, and cannot be said to hold office under the State; that such offices are held under the city. . . . At this point it is said that we must draw the line; that when we pass the confines of the smallest village or the largest city the section does not apply. Such localities are parts of the State; State laws are in force within such territory, and the various officers have to perform many functions pertaining to State as contradistinguished from city affairs. The State revenues have to be lev-

ied, collected, and paid over by them through county officers, the same as in the township; highways have to be provided, repaired, and maintained; schools in substantial harmony with the State school system must be maintained, which are in part supported by the State school funds; the criminal laws are enforced through justices' and other courts, constables, marshals, police officers, etc.; some officer in these localities has the custody of securities for debt, as does the township clerk; the council takes the place of the township board in the management of local affairs; elections for State, county, and local officers are in charge of city and village officers; and it is obvious that the volume of State business in a busy city is much greater and more complicated and important than in a rural township. Still it is urged that the constitution makers had no intention of excluding occupants of municipal officers from executing the office of governor, while at the same time they prohibit incumbents of the office of county overseer of highways, school inspector, or even notary public from performing the duties of governor.

It would seem manifest that, if the contention of counsel for the respondent is correct, it must be based upon some other reason than a lack of interest on the part of the State in the performance of their duties by city officers. We do not recall a reason that has been given that will serve to explain satisfactorily why the mayor of a city should be permitted to execute the office of governor, when the incumbent of the lowest office in a township or a post-office at crossroads is prohibited. But plain as this may seem to be, there are cases which make a distinction between State and municipal offices.

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The matter is summed up in *Chambers* v. *State*, 127 Ind. 365, and the distinction shown to be generally recognized is clearly drawn. After discussing the various cases, the court continues:

"It must, therefore, be regarded as the settled law of this State that if an office is purely municipal, the officer not being charged with any duties under the laws of the State, he is not an 'officer' within the meaning of the Constitution; but if the officer be charged with any duties under the laws of the State, and for which he is entitled to compensation, the office is a 'lucrative office', within the meaning of the constitution."

The recent case of *Montgomery* v. *State* (decided at the November, 1894, term of the Supreme Court of Alabama), 107 Ala. 372, contains the latest view of this subject that we have met. The

provision of the Constitution is as follows: "No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this state which shall have been created or the emoluments of which shall have been increased, during such term, except such offices as may be filled by election of the people." The office was that of judge of the police court of a city. The court quoted copiously from some of the cases hereinbefore cited, and held the office to be prohibited.

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It yet remains to determine whether the office of mayor of Detroit has state functions, and, when the provisions of law bearing upon that question shall have been collected, it will leave no room for doubt. By the charter (Act. No. 326, Local Acts 1883, chap. 5, sec. 1), the mayor is made a conservator of the peace, which, as has already been said, imposes a State duty, which he holds in common with all magistrates. 2 How. Stat. Sec. 9264, imposes similar duties.

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Again, section 9435 authorizes the mayors of all cities to require persons to give security to keep the peace, and section 9454 *et seq.* authorizes them to conduct examinations of persons charged with crime, and commit them to jail, or require a recognizance for appearance at the circuit court for trial. Again, section 9479 authorizes mayors to admit persons charged with crime to bail. Section 9385 commands mayors to issue proclamations requiring saloons to be closed upon election days, and again emphasizes the State character of this requirement by making a violation of the section a misdemeanor, punishable by fine and imprisonment. Again, under 1 How. Stat. Sec. 911, in cases of riot, breach of the peace, tumults, or violent resistance of any *process of this State*, it is within the power of the mayor to call upon the commanding officer for aid from State troops; and section 913 provides a punishment for officers who refuse to comply with the request. Again, mayors are made members of the boards of health. Section 1681. See, also, section 42, chap. 7, of the charter for authority of the council in relation to the preservation of the public health and section 38 for authority as to drainage. And see Act No. 36, Local Acts 1883, which authorizes the mayor to nominate persons to fill vacancies upon the school board. This is under a general law, as is his veto power given by Act No. 394, Local Acts 1893, which was held constitutional in *Pingree* v. *Board of Education*, 99 Mich. 404. Again, the mayor may administer oaths (section 14, chap. 5, of the char-

ter); and, under section 15, may hear complaints and annul or suspend licenses for violations of the ordinances, or *any other law of the State.* Other duties pertaining to state affairs might be mentioned, but these are perhaps the most significant, and are ample to show that the mayor of Detroit holds office under this state; and we think it beyond reasonable contention that this office is within article 5, sec. 15, prohibiting the execution of the office of governor by one holding it.

Are the offices of mayor of the city of Detroit and the governor of the State incompatible under the common-law rules? It is the universal rule that when such incompatibility exists, the acceptance of the latter office vacates the first. *State* v. *Goff*, 15 R. I. 505 (2 Am. St. Rep. 921, and authorities cited.) The authorities are in substantial agreement as to the rule of incompatibility, and Mechem states it as follows: "The incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both." Mechem, Pub. Off. Sec. 422.

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The sole difficulty lies in the application of the rule, and in every case the question must be determined from an ascertainment of the duties imposed by law upon the two officers. If one has supervision over the other, or if one has the removal of the other, the incongruity of one person holding both offices is apparent, and the incompatibility must be held to exist so that the acceptance of the latter vacates the former. We have already referred to the provisions of the charter and the statute laws imposing duties upon the mayor. For the violation of some if not all of these, he might be removed from office by the governor under the statute hereinafter cited. Section 653, 1 How. Stat., provides that "the governor may remove all county officers chosen by the electors of any county or appointed by him, and shall also remove all justices of the peace and township officers chosen by the electors of any township, or city or village officers chosen by the electors of any city or village," etc.

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If a superior officer is clothed with power to remove from office an inferior officer, there is certainly no logic or reason in holding that one person may hold both. No more marked incompatibility is possible.

The remoteness of the necessity for the removal of a mayor by

the governor is urged by counsel for the respondent as a reason why a legal incompatibility does not exist at common law. The question, however, is one of the existence of the power, and not the remoteness of its exercise.

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The power of removal is ever present, ready for use when its exercise is required. The argument that the contingency for its use is very remote is without force. We have been unable to find a decision which holds that one person may hold two offices, in one of which he is clothed with power to remove the person holding the other. It follows that the offices of mayor and governor are incompatible.

In the course of these proceedings, reference has been made, on behalf of respondent, to the alleged fact that Mr. Pingree was elected to the office of governor after a public declaration of an intention to continue to perform the duties of the office of mayor, and it is intimated that a result which ousts him from the office of mayor will have the effect to disfranchise the people, and that such a result is fraught with dangerous consequences. Were it not for the eminence of counsel who present these considerations to this court, we should hesitate about adverting to such elementary principles as furnish an answer to these suggestions and demonstrate their impropriety as well. Even the power of majorities may be, and often is restrained, by the written Constitution; and where the majority assumes to do what is forbidden, or to do what is permitted in a mode forbidden by the Constitution, the duty of the court to protect the rights of minorities is too manifest to require at this day, either apology for its exercise or an elucidation of its source of authority. If, in law, the effect of the election of Mr. Pingree to, and his acceptance of, the office of governor operated to vacate the office of mayor, a court that would weigh majorities before so declaring would deserve impeachment and the contumely which would follow.

We have yet to consider the effect of the attempt to execute both offices. Mr. Pingree has taken the constitutional oath, and is in possession of the office of governor, and performing its duties. The section of the Constitution renders the two offices incompatible, as does the rule of the common law already discussed; and the general rule that the acceptance of a second vacates the first of two offices that are incompatible is not only the rule of the common law, but is held to apply to incompatibility growing out of constitutional provisions in several of the cases hereinbefore cited. See

People v. *Sanderson,* 30 Cal. 160, 167; *People* v. *Provines,* 34 Cal. 520, 541; *Foltz* v. *Kerlin,* 105 Ind. 221 (55 Am. Rep. 197); *Daily* v. *State,* 8 Blackf. 329; *Shell* v. *Cousins,* 77 Va. 328; also *Northway* v. *Sheridan,* 111 Mich. 18.

From what is said, it is obvious that the respondent should not have refused to call an election, and, in view of the fact that an election is to be held in Detroit on the 5th day of April next, it is desirable, upon the ground of economy, that this vacancy be filled at that time, if it can be legally done. Counsel seem to agree that seven days' notice of the special election to fill this vacancy is sufficient, and there is ample time to nominate candidates at conventions which have been already or can yet be called. It is conceded by counsel for the respondent that primaries for a special election may be held after the time specified in Act No. 411, Local Acts 1895, if there be time to print the ballots. We are therefore of the opinion that the election can be lawfully held at that time.

The writ will be granted as prayed, requiring the respondent to take all necessary steps to hold such election at the time named.

The other Justices concurred.

DETURK V. COMMONWEALTH.

Supreme Court of Pennsylvania. November, 1889.

129 Pa. St. 151.

GREEN, J. . . . . .

The respondent in the case, being the postmaster of DeTurkville, in the township of Washington, was elected in the fall of 1887 a county commissioner; and having been duly sworn in, has occupied and filled the office of county commissioner since January, 1888. At the instance of E. W. Frehafer, the district attorney has instituted the proceeding by *quo warranto,* to try the right of the respondent to hold the office of county commissioner, on the ground that by the constitution he cannot be postmaster and commissioner at one and the same time. Prior to the filing of an answer by the respondent, he resigned his office as postmaster, which resignation was duly accepted by the proper authorities. These are the facts in the case and they are not disputed.

The second section of article XII of the Constitution of Pennsylvania, provides that "no member of Congress from this State nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this state to which a salary, fees, or perquisites shall be attached. The general assembly may by law declare what offices are incompatible."

A postmastership under the United States is undoubtedly an office of profit, for the law provides compensation for the officer. In the present case, it is an office of very small profit, indeed, for the compensation does not exceed the sum of thirty dollars annually; nevertheless it must be classed as an office of profit. The office of county commissioner is one to which a salary is attached, the law providing a per diem pay of two dollars and fifty cents. Under the plain reading of the law it would seem clear that the respondent cannot be both postmaster and county commissioner.

. . . . . .

When the present case was before the court it was argued as though the main question was one of the incompatibility of offices, and that defendant might either hold both, so long as no law of the state declared them incompatible; or, if they were incompatible *per se*, then the acceptance of the second office raised the presumption of a resignation of the first, and that the act of May 15, 1874, P. L. 186, upon the subject, did not declare the offices held by the respondent incompatible. A great many authorities both English and American were cited upon the questions arising from the incompatibility of offices, and whilst the law as decided by the different courts seems to be uniform and in accordance with the contention of the defendant, yet it has no bearing upon the case before the court. It is not a question of incompatibility or the reverse. It is simply a question of constitutional prohibition. The cases have therefore no relevancy in deciding this case.

. . . . . .

But what effect does the resignation of the respondent as postmaster, and its acceptance by the proper authorities, have upon the question? Has he thereby qualified himself to hold the county office?

It is true he was disqualified when he took upon himself the duties of the office and was sworn in, and also when the writ of *quo warranto* was issued, and why may he not make himself competent by a subsequent resignation? Having put himself in the

position of holding only one office, has he not conformed to all that the constitution requires, that he shall not "at the same time hold or exercise" the two offices. The law does not declare him ineligible because he held the office under the general government. It merely says he shall not hold both at the same time. If this question were one of first impression, my own inclination would be to hold that having removed the disqualification, he could retain the state office, because the requirements of the Constitution would have been complied with. But what few authorities I have been able to gather, seem to rule that the disqualification must be removed before the officer is sworn in and enters upon the duties of the second office. In the case of the *Commonwealth* v. *Pyle,* 18 Pa. 519, the opinion of the court was delivered by Chief Justice Black, and that eminent judge decided that "when the constitution or a statute declares that certain disqualifications shall render a person ineligible to an office, he must get rid of his disqualifications before he is appointed or elected. Such have been the decisions of Congress in the contests there. But if the law merely forbids him to hold or enjoy the office, or exercise its duties, it is sufficient if he qualifies himself before he is sworn. A man may hold one office after he has been chosen to another which is incompatible with it, without thereby forfeiting either of them, provided he resigns the first before he enters upon the duties of the last."

It would clearly follow from this that a resignation of the first office, long after entering upon the duties of the second, is too late, and will not cure the disqualification. Probably the law is so declared, in order to remove the temptation of illegal holding on to two or more officers at the same time as long as possible, and only relinquishing at the last moment by a resignation enforced by the fear of an ouster. The constitutions of all or nearly all the states contain provisions similar in their nature to our own. They are intended to carry out the well-defined policy of keeping distinct and separate the respective functions of national and state government. It is for the purpose of preventing any encroachments of the one upon the other, and particularly of the general upon the state government that these clauses are inserted in state constitutions; so that state officers shall have no divided, or perchance, no inconsistent or incompatible duties to perform. This is the general principle and we are bound to carry it out in the administration of the law, even though it hits so humble a personage as the postmaster of DeTurkville, in the county of Schuylkill. No objection is made to his competency or to his honesty; nor is it even hinted

that there is danger that the relations between the state and federal government are about to be disturbed by allowing him to retain both offices, or that the cause of free government may receive a shock by permitting one and the same person to handle the mails at DeTurkville, and at the same time act as a county commissioner. But the law is no respector of persons. All are subject to its mandates, and whether the office be great or small, there is no exception to limit it or control the operation of the general principles.

In the case of *Privett* v. *Bickford,* 40 Am. Rep. 301, the same principle is laid down as was decided by Judge Black in *Commonwealth* v. *Pyle.* It was there decided that "although one elected to an office may, at the time of election, be politically disqualified from holding the office, yet, if such disqualification be removed before the issuing of the certificate and taking possession of the office, he may legally hold it." See also *Foltz* v. *Kerlin,* 105 Ind. 231 (55 Am. Rep. 197) and 4 B. Mon. (Ky.) 224 and 499.

From what we have already said it seems clear that the Commonwealth is entitled to judgment in the present case with costs. It is but proper to say that this is the unanimous conclusion of the court.

And now, January 14, 1899. Judgment of ouster against the defendant, and that the Commonwealth recover her costs, to be taxed according to law.

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This opinion, which is the opinion of the lower court set forth at length in the opinion of the Supreme Court was reversed on appeal to that court. It seems, however, to he supported by the greater weight of authority.

GRAY V. SEITZ.

Supreme Court of Indiana. January, 1904.

162 Indiana 1.

DOWLING, J. Appellant and appellee were opposing candidates for the office of county auditor of Brown county at the general election held in November, 1902. The appellee received 1,019 of the legal votes cast at the election, and the appellant 615 of such votes. The appellant within the time fixed by law, gave notice of his intention to contest the election of the appellee, and filed his

statement of the grounds of such contest in the office of the clerk of Brown county. The board of commissioners of said county was thereupon convened to try the cause and the appellee appeared to the action. On the motion of the appellee the proceeding was dismissed by the board on account of the insufficiency of the facts stated to constitute a cause of action. An appeal from this judgment was taken to the Brown Circuit Court, where the motion to dismiss was renewed. The court sustained the motion, and rendered judgment for the appellee.

The error assigned is upon the ruling on the motion to dismiss.

The ground of contest was the alleged ineligibility of the appellee to the office at the time of the election, and at the time of the commencement of the term thereof.

. . . . . .

The supposed acts of bribery consisted in procuring the withdrawal of Ross as an opposing candidate for the nomination for county auditor at a democratic primary election held November 15, 1901, and in entering into an agreement with Hanna and Tabor, electors of said county, by which they undertook to use their influence with the other electors of the said county for the said John B. Seitz as a candidate for the office of county auditor, and to discourage and dissuade any other elector of said county from becoming a candidate at said primary election for nomination to said office in opposition to said Seitz, in consideration of which withdrawal of said Ross and the said services of the said Hanna and Tabor, the appellee, on October 15, 1901, executed his promissory note for $300 payable to said Ross ninety days after its date.

It is insisted by the appellant that these proceedings rendered the appellee ineligible to the office of county auditor, to which he was elected, under § 6, article 2, of the Constitution of this State, and also under § 2327 Burns 1901, defining and punishing the offense of bribery at primary elections. The provisions of the Constitution, *supra*, is as follows: "Every person shall be disqualified for holding office during the term for which he may have been elected, who shall have given or offered a bribe, threat or reward to secure his election." And § 2327, Burns 1901, declares that, "Any person being a candidate for nomination to any office of profit or trust under the Constitution or laws of this State, or of the United States, before any convention held by any political party, or at any primary election, who loans, pays, or gives or promises to loan, pay or give any money or other thing of value

to any delegate or elector, or any other person, for the purpose of securing the vote or influence of such delegate, elector, or person for his nomination, and whoever hires or otherwise employs for consideration any person to work for the nomination of any person to any office, or to work for the selection of any delegate to be chosen at any party convention or primary election, shall, *upon conviction thereof,* be fined in any sum not more than $500, and disfranchised and rendered incapable of holding any office of profit or trust within this State for any determinate period, and if nominated shall be ineligible to hold such office."

Section 6, article 2, of the Constitution, and § 2327, *supra,* are highly penal, and must be strictly construed as against the persons who are sought to be subjected to the penalties and forfeitures imposed. It seems perfectly clear that § 6, article 2, of the Constitution applies only to bribes, threats, or rewards, given or offered to secure the election of a candidate at a final or popular election. No mention is made of a primary election, and the language used refers exclusively to the election by virtue of which title to the office is claimed. Section 2327, *supra,* renders any person ineligible to any office, for the nomination for which he is a candidate at any primary election, who loans, pays, or gives, or promises to loan, pay, or give, any money or other thing of value to any delegate or elector, or an other person for the purpose of securing the vote or influence of such delegate, elector, or person for his nomination; or who hires or employs for a consideration any person to work for the nomination of any candidate for any office to be chosen at a primary election.

The complaint charges that in consideration of the withdrawal of Ross, the opposing candidate for the nomination for county auditor at the primary election, and an agreement of Hanna and Tabor, on behalf of themselves and Ross, to use their influence with the electors of the county for the appellee, and to discourage and dissuade any other elector of the county from becoming a candidate for the nomination for county auditor at said primary election in opposition to the appellee, the later agreed to pay to Ross $300 and execute his note, with surety, for said sum.

The agreement alleged to have been entered into by the appellee with Hanna, Tabor, and Ross, fell under the prohibition of § 2327 of the statute. It included an express promise, in writing by the appellee, who was a candidate for nomination to an office of trust and profit at a primary election, to pay $300 in money to Ross, an opposing candidate, for the purpose of securing his with-

drawal from the race, and the influence and services of Hanna and Tabor for the nomination of the appellee.

But the unlawful agreement did not of itself render the appellee ineligible to the office to which he was afterwards elected. It is true that ineligibility to hold the office to which the person violating § 2327, *supra,* is chosen is declared to be one of the penalties for the violation of the section. These penalties, however, attach only to one who has been duly charged with, and convicted of, the misdemeanor created by the statute. It is expressly declared that, "upon conviction thereof" the person violating the statute "if nominated shall be ineligible to hold such office." The provision of the statute differs materially from § 6, article 2, of the Constitution. The latter makes the fact that the candidate at a popular election has given or offered a bribe, threat, or reward to secure his election an absolute disqualification for holding the office for the term for which he has been elected. It has been said to be "self executing." *Carroll* v. *Green,* 148 Ind. 362. The penalty of the statute becomes effective only after trial, conviction and judgment.

We express no opinion with regard to any objections which may be taken to § 2327, *supra,* but hold that the complaint was insufficient because it failed to allege that the appellee had been adjudged guilty of a violation of its provisions. The pleading was not good under any other section of the statute.

The court did not err in sustaining the motion to dismiss the action.

Judgment affirmed.

One who appoints or participates in appointment to an office is by common law disqualified for that office. People v. Thomas, 33 Barb. (N. Y.) 287; State v. Hoyt, 2 Oregon 246.

CHAPTER V.

THE TERMINATION OF THE OFFICIAL RELATIONS.

I. Expiration of the Term.

PEOPLE EX REL. ELDRED, RESPONDENT V. PALMER, APPELLANT.

Court of Appeals of New York. October, 1897.

154 N. Y. 133.

Appeal from an order of the Appellate Division of the Supreme Court in the second judicial department, entered October 6, 1897, which reversed an order of Special Term denying relator's motion for a peremptory writ of mandamus.

Andrews, Ch. J. This proceeding was instituted to obtain an order requiring the secretary of state to include in his notices among the names of the officers to be voted for at the ensuing election for the county of Kings that of district attorney. The sole question relates to the duration of the term of the present incumbent of that office, who was elected at the general election held in November, 1895. It is claimed in behalf of the relator that the election of the present incumbent was for the term of two years from January 1, 1896, and that his term expires December 31, 1897. It is insisted, however, in behalf of the defendant, that by force of chapter 772 of the Laws of 1896, passed after the election of the present incumbent, his term of office was fixed at four years from the time of his election, which does not expire until December 31, 1899. The constitutionality of that statute is challenged, and it has been held by the Appellate Division for the second department that the statute is unconstitutional in so far as it continued the present incumbent in office for the term mentioned. Prior to the first day of January, 1895, the provision of the Constitution which regulated the election and term of district attorney was as follows: "Sheriffs, clerks of counties, including the register and clerk of the City and County of New York, coroners and district attorneys, shall be chosen by the electors of the re-

spective counties, once in every three years and as often as vacancies shall happen." (Const. of 1846, art. X, sec. 1.) The predecessor of the present incumbent of the office was duly elected in 1892 for three years under the Constitution of 1846, and his term expired December 31, 1895, and the present incumbent, as stated, was elected as his successor. When he was elected the term of district attorney for Kings County had been changed by article X, sec. 1, of the new Constitution, which took effect January 1, 1895, which declared: "Sheriffs, clerks of counties, district attorneys and registers, shall be chosen by the electors of the respective counties, once in every three years and as often as vacancies shall happen, except in the counties of New York and Kings, and in counties whose boundaries are the same as those of a city, where the officers shall be chosen by the electors once in every two or four years as the legislature may direct." The object of this provision prescribing that the terms of the county officers mentioned in the counties of New York and Kings, should be two or four years, was to bring the time of electing these officers into harmony with the new constitutional provision contained in art. XII, sec. 3, requiring that the election of city officers, except in cities of the third class and of county officers elected in the counties of New York and Kings, "shall be held on Tuesday succeeding the first Monday in November in an odd numbered year, and the term of every such officer shall expire at the end of an odd numbered year." It is manifest that to carry out the purpose that county officers in the counties of New York and Kings should be elected in odd numbered years, it was essential to change the term from an odd to an even number, as a continuous three-year term would necessarily make every alternate term expire in an even numbered year. For this reason it was declared in article X, sec. 1, that "such officers shall be chosen by the electors once in every two or four years as the legislature shall direct." This provision doubtless contemplated that the legislature would act and fix the term of the district attorney and the other county officers in the counties of New York and Kings at the one or the other of these periods. The whole legislative session of 1895, however, was allowed to pass without any statutory enactment fixing the term of the district attorney or any other of the county officers in Kings County, so that when the present incumbent of the office of district attorney of Kings County was elected in the fall of 1895, there was no legislative enactment in force prescribing the duration of the term. The former term of three years had been abrogated by force of the new constitutional

provision, and the legislature had omitted to prescribe any other term. The incumbent was not elected for three years for the reason stated. There was no statute defining the duration of his term, and if nothing subsequently had occurred, the election was either wholly invalid, because no term had been prescribed, or he was elected for an indefinite term, or for a term of two or four years, if by a reasonable construction of the Constitution it could be held that in the absence of legislation the duration of the term was fixed by the Constitution at one of the two periods. But on the 20th of May, 1896, after the present incumbent had entered upon his office, the legislature enacted chapter 772 of the laws of that year as follows: "The present district attorney of the County of Kings shall continue in office until the 31st day of December, 1899, and his successor shall be chosen at the annual election to be held next preceding the said 31st day of December, 1899, for the term of four years, and thereafter district attorneys of the county of Kings shall be chosen by the electors of said county once in every four years." If this was a valid exercise of legislative power, then the term of the present incumbent will continue until the 31st day of December, 1899, and no election of a successor can be held until November of that year.

We concur with the Appellate division that the act, so far as it undertakes to continue the present incumbent in office until December 31, 1899, is unconstitutional and void, and without elaboration we shall state our reasons for this conclusion. The words of the Constitution are that the district attorney and other officers mentioned in art. X, sec. 1 to be elected in Kings county, "shall be chosen by the electors once in every four years as the legislature shall direct." The clear import of the language is that the direction of the legislature fixing the term shall precede the choice to be made. The officers are to be "chosen" by the electors for one of two periods, not for an indefinite period to be subsequently defined by the legislature. It would be contrary to all precedent that the electors should not be advised before casting their votes of the duration of the term of the officers to be elected. The power attempted to be exercised by the legislature in this case, if sustained, would open the door to obvious abuses. It would practically confer upon the legislature the power to prescribe a short or long term, and to shorten or lengthen the official life of an officer, who by the Constitution is to elected by the people, upon considerations wholly foreign to their true interests. The court, in *People ex rel. Fowler* v. *Bull* (46 N. Y. 57), had occasion to con-

sider an act of the legislature extending the term of an elected officer, and Judge FOLGER'S opinion in that case presents with great force the public considerations which require the condemnation of such legislation. It was regarded as subversive of the principles of the elective system and contrary to the true interpretation of the Constitution. The act of 1896 is in effect an attempt on the part of the legislature to appoint to office, and by its fiat, without the concurrence of the electors, to protect the present incumbent in the possession of an office for a term for which he never has been elected, unless, indeed, the wholly inadmissible claim of the appellant can be maintained, that the electors voted for the present district attorney for a term, to be thereafter fixed by the legislature, of two or four years. This contention ignores the plain meaning of the constitutional provision, and also one of the canons of construction applicable as well to Constitutions as to statutes, that provisions prescribing power or giving authority are to be construed, in the absence of a clear intention to the contrary, as conferring power or authority to be exercised in respect to the future, and not as to transactions already consummated.

Having reached the conclusion that the act of 1896, so far as it assumed to fix the term of the present incumbent of the office, was invalid as an exercise of the power conferred by the Constitution upon the legislature to fix the term of office of the district attorney, it remains to consider whether, in the absence of legislation, the Constitution itself fixed the term of the present incumbent. We are of opinion that, until the legislature acted, the terms of county officers elected in the counties of New York and Kings must be deemed to be two years, which, as to future cases, may be extended to four years if the legislature shall so prescribe. The legislature had the option to prescribe either one or the other of the two periods. But not having exercised it, the minimum period should be taken as the duration of the term. This construction gives effect to the constitutional provision requiring elections for municipal officers and county officers in New York and Kings counties to be held in an odd numbered year. It fixes the term at the only period which with certainty was included within the intention of the electors, and prevents any hiatus in the incumbency of county offices. It enforces the public policy that the term of office of an elected officer shall be fixed before the election. It renders fixed and stable the terms of office and prevents an exercise of legislative power in legislating an incumbent in or out of office upon partisan considerations. It leaves to the legislature the unrestricted right

to prescribe for the future the duration of the term at the minimum or maximum period. While the construction we adopt is not free from doubt, it is most consistent with the principles of the elective system and the uniform policy upon which the courts have acted in dealing with analogous conditions. It is to be observed that sheriffs, county clerks and registers are in the same category as district attorneys in art. X, sec. 1, of the Constitution. If the act of 1896 was a valid exercise of legislative power, then the sheriff and register of Kings county to be elected this fall may have a two or four years term as the legislature may hereafter prescribe, for up to this time no legislation has been enacted prescribing the duration of their terms. Every consideration of public policy demands that no such demoralizing condition of the public service should be permitted and we are all satisfied that the Constitution does not require it.

That part of the act of 1896 which prescribes a term of four years for the office of district attorney, from and after December 31, 1899, is separable from the other provisions and is, we think, a valid fixing of the terms of this officer to be elected in that and subsequent years. The term of the officer to be elected this year will be two years, terminating December 31, 1899. The statutory and constitutional authority for holding an election for district attorney in Kings county the present year is ample. The statute prescribes that a general election shall be held in November of each year. The Constitution, article XII, sec. 3, prescribes that elections for the offices mentioned therein "shall be held on the Tuesday succeeding the first Monday of November in an odd numbered year." Whatever officers are to be elected may be voted for at the ensuing election.

We concur in most of the views and in the conclusions in the opinion below, and the order appealed from should, therefore, be affirmed.

All concur.

Order affirmed.

See also Indianapolis Brewing Co. v. Claypool, 149 Ind. 193, *supra*, on the power of the legislature to fix the term of an office.

THE PEOPLE EX REL. KINGSLAND V. PALMER.

Court of Appeals of New York. January, 1873.
52 N. Y. 83.

Appeal from an order of the General Term of the Supreme Court in the first judicial department, reversing an order of special term denying a motion for a writ of peremptory *mandamus* and directing that a writ issue.

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ALLEN, J. The objections made on behalf of the appellant to the order appealed from will be noticed in their order.

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2. The next objection is that the accounts are not properly certified. The labors were performed between June 1, 1864, and February 28, 1866, and were certified after the latter date, by a single certificate, signed by all the commissioners in office at the time. One of the commissioners named in the act died October 10, 1863, and another ceased to be a resident of the state in 1864; and the last meeting of the commissioners he attended was July 12th of that year. The remaining commissioners united in the certificate.

It is not claimed that the commission ceased to exist whenever a vacancy occurred, or that the power of the remaining commissioners was suspended until the vacancy should be filled.

In *People* v. *Nostrand,* 46 N. Y. 375, the act under which the question arose (Laws of 1869, chap. 905) required vacancies to be filled, as they occurred, by appointment; and the court held that a vacancy existing, the power of the remaining commissioners was suspended until an appointment should be made.

Here there is no provision for a vacancy, or for the appointment in place of any commissioner who should die, refuse to act, resign or remove from the State. The three commissioners still in office having joined in the certificate, the presumption is that the act was regularly done, and at a meeting of all. *Downing* v. *Rugar,* 21 W. R. 178. That those who gave the certificate could act, although the other commissioners had died or become disqualified, see the authorities cited by Judge Cowen, at page 182 of the case cited.

A grant of power, in the nature of a public office to several does not become void upon the death or disability of one or more. Such a grant of power is not in the nature of a private franchise which,

when granted to two, without words or survivorship, might not, by the rules of the common law, survive the death of one. But the policy of the law is to guard against the failure of a public service and therefore, by statute, it is provided that whenever any power, authority or duty is confided by law to three or more persons, and whenever three or more persons or officers are authorized or required by law to perform any act, such act may be done and such power, authority or duty may be exercised and performed by a majority of such persons or officers upon a uniting of all, unless special provision is otherwise made. 2 R. S., 555, S. 27. In certain cases a majority may act, when all have been notified to attend a meeting of those entrusted with the power.

By death or disqualification of a portion of the commission the number of its members is reduced, and all do meet when all who are living and qualified to act come together.

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The order appealed from must be affirmed, with costs.

All concur.

Order affirmed.

KREIDLER V. STATE.

Supreme Court of Ohio. December, 1873.

24 Ohio State 22.

DAY, C. J. The prosecution was founded on section 13 of the act of March 8, 1831, "for the punishment of certain offenses therein named." S. & C. 429. The section enacts, "That if any person shall take upon himself to exercise or officiate in any office or place of authority, in this state, without being legally authorized," the person so offending shall, upon conviction thereof, be fined or imprisoned as therein stated.

The material question in the case is, whether the mere fact of officiating in an office, without legal authority, is under all circumstances a crime under this section. The Probate Court proceeded upon the theory that it is. We think otherwise. For, to constitute the offense, a person must do something more than merely discharge the duties of an office without legal authority. He must "take upon himself" official functions in such sense as implied an *assumption* of the office without color of right. Therefore, to

"take upon himself" the exercise of an office without being legally authorized, within the meaning of the section, is such an assumption of official authority as imports a willful usurpation of an office. This was what was intended to be punished, and nothing short of it comes within the strict sense of the statue. Otherwise, an officer *de facto,* acting in good faith, under color of right, not designing to "take upon himself" an office without legal right, might unconsciously commit a crime in doing what the law would recognize as a valid act.

Nor does it follow that an officer who may be ousted from an office by proceedings in *quo warranto* is guilty of the criminal offense of usurping the office. It was held in *Ohio* v. *Alling,* 12 Ohio 16, that two common pleas judges, who continued to officiate after their office was terminated by a legislative enactment, which admitted of a reasonable doubt whether that was its legal effect, were *de facto* judges, and could not be regarded as "usurpers and intruders;" and their acts were held to be valid. It is clear, therefore, that they could not have been regarded as guilty of the crime of usurpation of office.

In the case before us, Kreidler was undeniably lieutenant of police *de jure* until the 6th of May, 1869, and the question was whether he did not continue such, under the city ordinance, until his successor was qualified. He proposed to prove that he and the city authorities in good faith believed he did; and claimed that if he was not such officer *de jure,* he acted in good faith under color of right, and therefore could not be regarded as usurping, or intentionally taking upon himself to exercise an office without being legally authorized. The court refused to permit him to make the proof he offered, and denied that any circumstances other than a legal right to the office could shelter him from the crime for which he was prosecuted. Therein we think the court was in error, and that the judgment must, therefore, be reversed, and the cause remanded for a new trial.

McIlvaine, Welch, Stone and White, J. J., concurred.

As to the effect on the official relation of the expiration of the term see Romero v. United States 24 Ct. of Cl. 331 *supra.*

STATE EX REL. MORRIS V. BULKELEY.

Supreme Court of Errors of Connecticut. January, 1892.

61 Conn. 287.

ANDREWS, C. J. This is an information in the nature of a writ of *quo warranto*. It alleges that the respondent, since the tenth day of January last, has used and exercised the office of governor of this State, and threatens and intends to continue to use said office, its dignities, liberties and franchises, and prays that he may be required to show by what warrant he claims to use and exercise said office. The respondent demurred to the information. The Superior Court made a finding of certain facts other than such as are set forth in the information, which includes the senate and house journals, to which the parties agreed, and reserved the case for the advice of this court.

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The case finds that the respondent, Morgan G. Bulkeley, was legally elected governor by the General Assembly on the 10th day of January, 1899, (there having been no election by the people) and entered at once upon the duties of that office. The term for which he was elected was till the Wednesday following the first Monday of January, 1891, and until his successor was duly qualified. If, then, no successor to him has been chosen, or being chosen, has not become duly qualified, respondent still holds the office of governor. He holds that office since the said Wednesday in January, 1891, by the same warrant that he held it prior to that date, and continues to be the *de jure* governor of the State. It is admitted that no person has been chosen to be the successor of the respondent, unless the facts set forth in the case show that the relator has been so chosen; and there is no claim but that, if so chosen, he is duly qualified. The inquiry then is: Has the relator been chosen governor according to the constitution and the laws?

The election of a governor is the selection of some person to fill that office. The selection must be one who possesses the required qualifications, and must be made by those who possess the right to vote, and at a time and place and in the manner prescribed by law. The election of state officers in this state is a process. It includes the preliminary registration, by which those persons who have the right to vote are determined; the time when, the place where, and the manner in which the votes are to be given in, and

also the manner in which the votes are to be counted and the result made known. Each of these steps must be taken in pursuance of the law existing at the time the election is had. That part of the election process which consists of the exercise by the voters of their choice is wholly performed by the electors themselves in the electors' meetings. That part is often spoken of as the election. But it is not the whole of the election. The declaration of the result is an indispensable adjunct to that choice; because the declaration furnishes the only authentic evidence of what the choice is. The right to choose any state officer, unless the result of the choice can be published in some way so as to be obligatory on the whole state, would be no better than a mockery; it would be to give the form of a choice without the reality. The declaration is the only evidence by which the person elected can know that he is entitled to the office, or the previous incumbent know that his term has expired. The courts can take judicial notice of the fact of an election, but never of the result of an election or of who is elected until some declaration is made. The declaration is the only evidence by which the other departments of the government and the citizens generally can know whom to respect as such officer. And in order that a declaration shall be made of the result of an election for governor in a way to be obligatory upon everybody, the constitution has fixed the time and manner in which the General Assembly shall make that declaration. Unless the declaration is made in the way so provided, the process of the election is not complete. No other authority than the General Assembly is empowered to make such declaration. It is found in the case that there has been no declaration by the General Assembly that the relator had been elected governor, and it is not claimed that there has been any equivalent act by any other authority. It follows that the relator—whatever any future inquiry may show—cannot now be said to have been elected to the office of governor; and that the respondent remains the *de jure* as well as the *de facto* governor of the state. It is therefore the duty of all citizens, of the courts, of all departments of the state government, and of both houses of the General Assembly, to respect and obey him accordingly.

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In point of form, in the present action, it is the right of the respondent to exercise the office of governor that is in question. But as the right of the respondent depends upon the election of the relator to that office, it is really the title of the relator that is on trial. If the relator has not been completely elected then the right of the respondent continues. The claim made in behalf of the re-

lator is that he ought to have been declared elected by the General Assembly, because, as appears from the returns of the presiding officers, he received a majority of all the votes cast for governor; and as the assembly did not do so, the court ought now to declare him elected or to regard him as having been elected by such apparent majority. This claim admits that if the General Assembly had declared the relator elected upon the returns the declaration would give him only a *prima facie* title to the office; and that if inducted into it upon such declaration, he might be ousted therefrom upon its being shown that he did not in fact have the real majority of the votes cast for governor. If the court should declare the relator elected upon the same returns it could give him no stronger title to the office than a declaration by the General Assembly. He could still be ousted upon a proper proceeding. It would be most unseemly for the court to occupy itself in putting the relator into the office of governor, if by any possibility it might happen that the court would be required to remove him from that office as soon as he began to exercise it.

The writ of *quo warranto* is the form of action specially adapted to try the right of an office. But it tries only the real title. It can never be used to try an apparent title. It gives judgment on that title alone which cannot be afterwards called in question. The information does not allege that relator had the majority of all the votes, but only the majority as it appeared by the returns of the presiding officers; while other parts of the information show that such apparent majority is in dispute. Nor does the information contain any allegation of facts which show that the General Assembly has become unable to decide upon the relator's right to the office he claims.

If the relator shall hereafter, by an amendment of the present information, or by a new one, allege that he received a majority of all the votes legally cast for governor on the 4th day of November, 1890, and it shall also appear from the facts therein stated that the General Assembly is without the power to make any declaration in respect to the election for governor, a case would be presented of which the Superior Court might take jurisdiction.

The Superior Court is advised that the information is insufficient, and to sustain the demurrer.

In this opinion SEYMOUR, TORRANCE and FENN, Js., concurred.

It follows from the application of the rule laid down in the principal case that there is no vacancy in office if the incumbent holds over under the statute and that therefore there is no occasion for the exercise of the

power to appoint to fill a vacancy when the statutory term expires without a new election or appointment. People v. Bissell, 49 Cal. 234; State v. Harrison, 113 Ind. 234; State v. Hume, 25 Ohio St. 588. If, however, there is no statutory provision as to holding over, a vacancy occurs at the expiration of the term of an incumbent in case there is no election or appointment of a successor, or one is appointed or elected who is not eligible, who does not qualify, or who dies, either without qualifying or before the expiration of the term. State v. Wilson, 72 N. C. 155; People v. Curtis, 1 Idaho 753.

II. Resignation.

BADGER V. UNITED STATES.

Supreme Court of the United States. October, 1876.

93 U. S. 599.

Mr. Justice Hunt delivered the opinion of the court.

No part of the answer in our judgment requires consideration, except that which raises the point of the legality of the resignation of the parties named. If they had ceased to be officers of the town when the *mandamus* was issued, there may be difficulty in maintaining the order awaiting a peremptory *mandamus* against them. If they were then such officers, the case presents no difficulty.

The alleged resignations of the supervisor and town clerk were accepted by the justices of the town; but their successors had not been qualified, nor, indeed, had they been chosen when the petition was filed. Does a supervisor, town clerk or justice of the peace of the state of Illinois cease to be an officer when his resignation is tendered to and accepted by a justice of the peace, or does he continue in office until his successor is chosen and qualified?

By the common law as well as by the statutes of the United States, and the laws of most of the states, when the term of office to which one is elected or appointed expires, his power to perform its duties ceases. *People* v. *Tieman*, 8 Abb. Pr. 359; 30 Barb. 193. This is the general rule.

The term of office of a district attorney of the United States is fixed by statute at four years. When this four years comes round, his right or power to perform the duties of the office is at an end, as completely as if he had never held the office. Rev. Stat., Sec. 769. A judge of the Court of Appeals of the State of New

York, or a justice of the Supreme Court, is elected for a term of fourteen years and takes his seat on the first day of January following his election. When the fourteenth of January thereafter is reached, he ceases to be a judicial officer, and can perform no one duty pertaining to the office. Whether a successor has been elected or whether he has qualified, does not enter into the question. As to certain town officers, the rule is different. 1 Rev. Stat. (N. Y.) 340, sec. 30.

The system of the State of Illinois seems to be organized upon a different principle.

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. . . It is enacted (art. 7, sec. 61, p. 1075) that, at the town meeting in April of each year, there shall be elected in each town one supervisor and one town clerk, who shall hold their offices for one year, and until their successors are elected and qualified, and such justices of the peace as are provided by law.

Of justices of the peace, it is enacted that there shall be elected in each town not less than two nor more than five (depending upon the population of the town), who shall hold their offices "for four years, or until their successors are elected and qualified." p. 637, sec. 1.

. . . . . .

Thus far it would seem plain that the office of a supervisor or town clerk could not be terminated until his successor subscribed and filed his oath of office, and that when the supervisor and town clerk before us supposed that their offices were at an end by their resignations, they were in error.

There are two other provisions which, it is supposed, have some bearing upon the point we are considering. Sec. 97 (p. 1097) provides that whenever a vacancy occurs in a town office by death, resignation, removal from the town, or other cause, the justices may make an appointment which shall continue during the unexpired term, and until others are elected or appointed in their places. By sec. 100 the justices of the town may, for sufficient cause shown to them, accept the resignation of any town officer, and notice thereof shall immediately be given to the town clerk.

A similar provision as to the elective officers of a higher grade is found in the statutes. By c. 46, sec. 124, *et seq.* (p. 466), it is provided that resignations of elective officers may be made to the officer authorized to fill the vacancy or to order an election to fill it, and the various events which may cause a vacancy are defined. Governors, judges, clerks of courts, etc., are specifically referred to.

The provision as to these officers and as to the town offices are parts of the same system. The resignations may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact; to-wit, the appointment of a successor and his qualification. When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor.

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. . . Thus justices hold for four years, supervisors and constables for one year; and should there be created or found to exist a town officer, and no provision be made as to the duration of his office, this section is intended to meet the case by fixing one year as such term. It has nothing to do with the case before us, further than it reiterates the rule everywhere found in the statutes of Illinois, that such person shall serve not only for one year, but until his successor shall qualify.

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In *People* v. *Hopson*, 1 Den. 574, and in *People* v. *Nostrand*, 46 N. Y. 382, it was said, that when a person sets up a title to property by virtue of an office, and comes into court to recover it, he must show an unquestionable right. It is not enough that he is an officer *de facto*, that he merely acts in the office; but he must be an officer *de jure*, and have a right to act. So, we think, where a person being in an office seeks to prevent the performance of its duties to a creditor of the town, by a hasty resignation, he must see that he resigns not only *de facto*, but *de jure;* that he resigns his office not only, but that a successor is appointed. An attempt to create a vacancy at a time when such action is fatal to the creditor will not be helped out by the aid of the courts.

Judgment affirmed.

For the rule as to the obligation to accept office see People v. Williams, 145 Ill. 573, *supra*.

STATE V. FERGUSON.

Supreme Court of New Jersey. November, 1864.

31 New Jersey Law, 107.

THE CHIEF JUSTICE. The issue which was to be tried in this cause was, whether William Ferguson, Jr., the defendant, was at the time of the service of the writ of *mandamus* upon him, an overseer of the highways of the township of Upper Alloways Creek, in the county of Salem. . . .

The defendant, on the trial, proved on his part that before the service of the *mandamus* he had sent in his resignation, in writing, of the office of overseer of the highways to four of the township committee, who had endorsed upon it an acceptance of such resignation. It further appeared that the fifth township committeeman, who had not signed the acceptance, had not been notified of the meeting at which the resignation was received and accepted, and was not present at it. This resignation and acceptance were overruled by the court.

Two question are discussed. *First.* Was the resignation of the officer complete, and did it operate as a discharge from the office in the sense of an acceptance? *Second.* Was there a legal acceptance of the resignation in this case?

First, as to the officer's power to resign. It was insisted on the part of the defendant that an overseer of the highways has the right, in law, to resign at will, and that the mere notification of the fact that he resigns discharges him from his office.

If he possess this power to resign at pleasure, it would seem to follow, as an inevitable consequence, that he cannot be compelled to accept the office. But the books seem to furnish no warrant for this doctrine.

To refuse an office in a public corporation connected with local jurisdiction, was a common law offence and punishable by indictment. In Vanacker's case, reported in *Carthew* 480 and in 1 *Ld. Raymond* 496, it was decided that a municipal corporation of common right possessed authority to impose fines for refusal to accept office, Lord Holt remarking, "that it would be in vain to give them such power to elect sheriffs, etc., if they could not compel the persons elected to serve." And again he says: "As every citizen is capable of the benefit of this franchise so he ought to submit to the charge also." And then in the case of *Pelson*, 2 *Lev.* 252, a suit

was sustained in a by-law of the corporation to recover a penalty for not serving in the office of steward. In *The Queen v. Hungerford,* 11 *Mod.* 142, a motion was made in the King's Bench for an information in the nature of a *quo warranto* against a common councilman of Bristol for refusing to take upon himself the office after he was chosen, but the court denied the motion and said their remedy was to proceed by their by-laws in order to compel him—he not being such a public officer as a sheriff—but if they had applied to the court for a *mandamus* they would have had it. The same principle was clearly recognized in the case of *The King* v. *Larwood,* 4 *Mod.* 270, which was an information against the defendant who had been elected sheriff in the city of Norwich, and who had refused to serve, "to the great hindrance," in the language of the information, "of the business both of the King and his subjects." So uniformly is this doctrine maintained by an extensive series of decisions that we find it stated as the unquestionable law by all the text writers. . . .

Regarding, then, this doctrine of the law as established, it seems to be an unavoidable sequence that the party elected, and who is thus compelled by force of the sanctions of the criminal law to accept the office, cannot afterwards resign it *ex mero motu.* If his recusancy to accept can be punished, it cannot be that he can accept and immediately afterwards, at his pleasure, lay down the office. The law is far too practical to admit of such a frustration of one of its regulations, designed for the protection of the public interest. The only authority which was cited to lend countenance to such a proposition was that of *The United States* v. *Wright,* 1 *McLean* 512, in which the question was whether the sureties of a collector of internal revenue ceased to be responsible for the acts of their principal subsequent to his resignation. . . However true the proposition may be as applied to the facts then before the Circuit Court, it is clearly inconsistent with all previous decisions, if extended over the class of officers where responsibility is the subject of consideration. . . . The decisions, in my opinion, go to this point and not beyond it, that a resignation, when completed by an acceptance, will be a discharge from the office.

The remaining question in this case then is, was there a legal acceptance of the resignation of the defendant?

I do not perceive how this point can be plausibly insisted on. The people elect the overseer, how can the township committee discharge him? Whence do they derive the power? Their whole authority is defined in the statute and they have none other, ex-

cept what is thus conferred and such powers as are necessary to carry into execution those thus expressly given. The 13th section, *Nix Dig. 875*, in the act relating to townships, provides for filling vacancies in the office of overseers of the roads by special election, and on the neglect of the electors gives the power to the committee to fill the office. But this power to appoint in a certain juncture does not certainly imply a right to assist in creating a vacancy. I cannot think the township committee are the agents of the corporation for the purpose of accepting resignations.

But, admitting the power to exist, it was not, in my opinion, legally exercised in this case. The township committee is composed of five members, and can no more legally act unless legally convened than the corporation can. All the members must be summoned. And in this case the fifth man was not present nor was he notified of the meeting. The rule that all the members of the corporate body, or of a branch of a corporate body who discharge special functions for the society, who have the right to consult and to vote, must be notified in some form to attend the meetings of the body to which they belong, is too familiar to require much reference to authorities in its support. See *Grant on Corp.*, 156-7-8.

My conclusion is that an overseer of the highways has not the right to quit his office at pleasure. And that the resignation of the defendant in this case was not accepted by competent authority; and that, consequently, the verdict below was right.

VAN DYKE, J., dissented.

REITER V. STATE.

Supreme Court of Ohio. February, 1894.

51 Ohio St. 74.

Error to the Circuit Court of Hamilton County.

The material facts found by the Circuit Court on the trial of this case, are as follows:

On the 21st day of February, 1893, Amos Hill, being the mayor of the village of Pleasant Ridge in Hamilton County, presented to the council while in session the following resignation:

"Pleasant Ridge, February 21, 1893.

"To the Honorable Council of the village of Pleasant Ridge:

I, Amos Hill, mayor, tender to you my resignation, to take effect March 1, 1893, as I cannot take time to attend to this office.

"Yours with respect,

"AMOS HILL."

On motion this resignation was laid over to the next meeting, March 7, when it was accepted by council to take effect at once, and at an adjourned meeting held March 11, George Reiter, plaintiff in error, was appointed mayor to fill the vacancy caused by the resignation of Mr. Hill, and on the same day Mr. Reiter was qualified and entered upon the duties of his office.

At the following April election John H. Durrell, was elected mayor of the village of Pleasant Ridge, and in due time gave bond, qualified, and demanded the office, but Mr. Reiter refused to surrender the office to him, and claimed that the election for mayor held in April, was not authorized by law, as the election occurred, as he claimed, less than thirty days after the vacancy.

Thereupon Mr. Durrell filed his petition in *quo warranto* in the circuit court of Hamilton county, to oust Mr. Reiter from the office of mayor.

Upon the above facts the Circuit Court found in favor of Mr. Durrell, ousted Mr. Reiter and ordered Mr. Durrell to be inducted into the office of mayor; to all of which Mr. Reiter excepted, and filed his petition in this court to reverse the judgment of the Circuit Court.

BURKET, J. Section 1754 of the Revised Statutes provides as follows:

"In case of the death, resignation, disability, or other vacation of his office, the council may, by a vote of a majority of all the members elected, appoint some suitable person within the corporation to act as mayor, and discharge the duties of the office until the vacancy is filled, or the disability removed: Provided, that at the next annual municipal election occurring more than thirty days after such vacancy, a mayor shall be elected for any unexpired term, unless the disability is of a temporary character."

The election was held on the third day of April, 1893. If a vacancy in the office occurred on the first day of March, then the April election occurred more than thirty days after such vacancy, and the election of Mr. Durrell was valid; but if the vacancy did not occur until the resignation was accepted on the 7th of March,

then the vacancy occurred less than thirty days before the April election, and in such case the election of Mr. Durrell would be void.

The date at which the vacancy occurred depends upon the question whether the delivery of the resignation to the council to take effect March 1st, caused a vacancy on that day, or whether the vacancy occurred upon the acccptance of the resignation on the 7th day of March. It seems to be well settled in England and at common law, that a resignation of an office does not take effect, so as to create a vacancy, until accepted by the proper authority. *Hoke* v. *Henderson,* 4 Deveraux (N. C.) 29; *Rex* v. *Mayor of Rippan,* 1 Lord Raym. 563; *Reg.* v. *Lane,* 2 Lord Raym. 1304; *Edwards* v. *United States,* 103 U. S. 471; *State* v. *Clayton,* 27 Kan. 442; *State ex rel. Reeves* v. *Ferguson,* 31 N. J. L. 107; *City of Waycross* v. *Youmans,* 85 Ga. 708; *State ex rel.* v. *Boecker,* 56 Mo. 19; *Badger* v. *U. S. ex rel.* 93 U. S. 599; *People* v. *Sup. Barnett Tp.,* 100 Ill. 332; *Jones* v. *City of Jefferson,* 6 Tex. 576.

The common law prevails in this state in so far as it is fairly applicable to our institutions and manner of living, unless abrogated or modified by statute. So that the real question in this case is, whether the common law rule as to resignations shall govern in this state, or whether that rule has been abrogated by our legislation, or is inconsistent with out institutions. That there is no statute expressly changing the common law in this respect seems clear; but it seems difficult, if not impossible, to reconcile our various statutes with the common law rule. The doctrine of the common law is that an officer has not the absolute right at his own pleasure to resign his office; that the public is interested as well as the individual incumbent; that an acceptance is necessary to perfect a resignation; and that the public have a right to command the services of any citizen in any official position which they may designate.

This common law doctrine seems inconsistent with out statutes as well as with our practical treatment of official positions.

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By the statutes . . . a clear intention is evinced that acceptance shall not be necessary to the validity of a resignation, except as to members of the general assembly, and persons appointed to certain positions of trust, and these exceptions only tend to make more clear the intention. These statutes also show that office holding is not regarded as compulsory in this state. It is, therefore, clear that the common law rule as to the acceptance of resignations

has been abrogated in Ohio, to the extent at least of authorizing the filling of the vacancy.

In many states, it is held that a resignation of an officer takes effect at once without acceptance by any one, and that the holding of office is not compulsory. This is said to be the modern doctrine on this subject. *U. S.* v. *Wright,* 1 McLean 509; McCreary on Elections, sec. 270; *People* v. *Porter,* 6 Cal. 26; *State* v. *Clarke,* 3 Nev. 566; *Olmstead* v. *Dennis,* 77 N. Y. 378; *State* v. *Mayor,* 4 Neb. 260; *Bunting* v. *Willis,* 27 Gratt. 144; S. C. 21 Am. R. 338; *State* v. *Hauss,* 43 Ind. 105; *Gilbert* v. *Luce,* 11 Barb. (N. Y.) 91; *Leech* v. *State,* 78 Ind. 570.

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The policy of the state, as shown by our statutes, favors the filling of vacancies in office by election as soon after a vacancy occurs as is consistent with proper care and consideration on part of the public. A proper regard for the rights of the people requires that it shall not be in the power of any officer, or body of men, to refuse to accept a resignation, and thereby prevent an election at the proper time to fill the vacancy. Such power, if conceded to exist, might tempt a partisan officer to delay the acceptance of a resignation until too late to fill the vacancy at the succeeding election, and thereby lengthen by one year the term of office of his own appointee. More harm is to be feared from this source, than from *hiatus* in office, an event not likely to occur in this state where men able and willing to fill office are so numerous.

The responsibility of a *hiatus* in office, should rest upon the person or body holding the appointing power, rather than upon the resigning officer. If the appointing power properly performs its official duties, no harm is to be feared from a *hiatus* in office.

It is, therefore, clear, on principles of public policy, as well as a proper construction of our statutes, that acceptance is not necessary to the validity of a resignation, in so far at least as to authorize the filling of the vacancy; and that the resignation in question in this case took effect on the first day of March, 1893, so as to create a vacancy which could be lawfully filled at the following April election.

What the rights of the public, or the duties of the resigning officer, may be for the protection of public interests and property from the date of the resignation to the filling of the vacancy, is not involved in this case, and need not now be decided. Should

any danger be apprehended from that source, the proper remedy can be supplied by the law-making power.

The judgment of the Circuit Court is

Affirmed.

MARY A. WARDLAW, AS ADMINISTRATRIX, RESPONDENT, V. THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, APPELLANT.

Court of Appeals of New York. February, 1893.

137 N. Y. 194.

O'BRIEN, J. The plaintiff's intestate was, on the first day of June, 1885, appointed assistant engineer in the department of public works of the city of New York. The salary of the place was fixed at $1,500 per year, which, on January 1, 1886, was increased to $1,800. He was paid the stipulated salary up to July 23, 1886, when the commissioner of public works addressed to him a communication in writing as follows:

"Notice of suspension as assistant engineer in the department of public works is hereby served on you, the same to take effect on and after July 31, 1886." The recovery in this case was for the salary subsequent to this date, and to January 30, 1890, on which last-named date the commissioner addressed to him another communication in writing as follows:

"Sir:—Understanding from the counsel to the corporation that you claim to be still in the employ of the department as an assistant engineer, and, without admitting the fact to be so, I desire to set at rest all doubt on that point by discharging you from and after this date, which I hereby do."

The original plaintiff died while the action was pending and the present plaintiff, his widow and administratrix, was substituted. The commissioner had power to discharge assistant engineers in the department at pleasure and the plaintiff's contention is that this conceded power was not exercised as to her intestate, until he received the last communication. It does not follow that because the commissioner in his first letter used the term "suspended" instead of "discharged" that he did not intend to terminate the employment as assistant engineer and to create a vacancy in the office if it be one, nor does it follow that Wardlaw

did not understand from this communication that his services were no longer required as an assistant engineer.

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He used the word *suspended* in the first letter and after being informed that there was a claim made that a dismissal was not thereby accomplished he used the word *discharged* in the second. If, however, Wardlaw understood from the first letter that his services were no longer required as an assistant engineer and that compensation was no longer to be paid to him in that capacity and that such was the purpose of this notice from the commissioner and both parties acted accordingly, then the first notice operated to terminate the employment, though it was called a suspension instead of a dismissal.

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. . . An officer suspended from the performance of the duties of his office by the appointing power, but not removed, is entitled to the salary of the office during the period of the suspension. (*Fitzsimmons* v. *City of Brooklyn*, 102 N. Y. 536; *Emmett* v. *Mayor, etc.*, 128 id. 117; *Gregory* v. *Mayor, etc.*, 113 id 416; *Lethbridge* v. *Mayor*, 133 id. 232.)

But the suspended officer may waive that right by express agreement or by conduct from which such an agreement or intention on his part may be fairly and reasonably inferred. When he accepts other employment from the appointing or removing power at larger compensation, the inference that there was an intention on his part to abandon the first position would seem to be strong, but even though the compensation in the new position be less, it might still be a question of fact whether he intended to abandon a position from which he could at any time be removed for another that promised more permanent employment, or at least was quite as certain in its tenure of duration.

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All concur.

Judgment affirmed.

Compare Gregory v. Mayer, 113 N. Y. 416, *infra*. The official relation is terminated also by the loss by the incumbent of an office of the qualifications for the office. Oliver v. The Mayor, 63 N. J. L. 634, *supra*.

III. Removal from Office.

1. Power of Legislature.

ATTORNEY GENERAL EX REL. RICH V. JOCHIM.

Supreme Court of Michigan. January, 1894.

99 Michigan 358.

Hooker, J. By Constitution (art. 8, sec. 4), and by statute (How. Stat., sec. 202), the Board of State Canvassers is made to consist of the Secretary of State, State Treasurer, and Commissioner of the State Land Office. It is the duty of this board to canvass the returns from the various counties of the state, and declare the result, of elections for State officers and upon constitutional amendments. At the spring election in the year 1893 four amendments to the Constitution were voted upon by the electors of the State, one of which provided for an increase of the salaries of several of the state officers, including the Secretary of State and the Commissioner of the State Land Office. These amendments were, by the Board of Canvassers, declared carried. Subsequently, the returns were recanvassed by the board, in obedience to a writ of *mandamus* issued by this court, when it was found and declared that the amendment relating to salaries was defeated. Proceedings were then taken by the Governor, which culminated in an order by him removing each of said officers from his office, and declaring the same vacant; and, respondents refusing to surrender their said offices, information in the nature of *quo warranto* were filed in the name of the Attorney General upon the relation of the Governor, to try their right to such offices. This is the proceeding against the Secretary of State.

The questions in the case are raised by the replication and the demurrer of respondent thereto. In answer to the plea, which asserts respondent's election and accession to the office of Secretary of State, the replication sets up in detail the facts upon which the relator's claim is based, viz.: That relator was the duly elected and acting Governor of this State; that, as such, it became and was his duty, under section 8 of article 12 of the Constitution, to inquire into the condition and administration of the office of Secretary of State, and the manner in which respondent performed the duties of such office, for the purpose of determining whether said respondent had been guilty of gross neglect of duty in rela-

tion to his duties as a member of the Board of State Canvassers, and to remove respondent from said office for gross neglect of duty, if he should be found guilty thereof; that, a charge of that kind having come to the knowledge of the relator, he caused written notice to be served upon the respondent, which notice required him to appear before the relator, and show cause why he should not be removed from his office of Secretary of State for gross neglect of duty in connection with the canvass of the returns in relation to said amendment relating to the salaries of State officers, such notice containing specific charges of neglect.

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The replication further alleges that the respondent appeared by counsel before relator, and moved to vacate the notice and dismiss the charges. . . . It is further alleged that the motion was denied; that evidence was introduced in support of the information.

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The replication further states that no evidence was offered upon the part of the respondent; that an order adjudging respondent guilty, and removing him from his said office, was thereupon made, and duly served upon said respondent, upon the 19th day of February, 1894. As stated, a demurrer to this replication was filed.

The important questions presented by this record are (1) the power of the Governor to remove respondent; (2) the sufficiency of the cause alleged. The jurisdiction of this Court to review or pass upon the official acts of a co-ordinate branch of government was not discussed. It was referred to in brief of counsel for relator, with an express disavowal of a desire to raise the question. We shall, therefore, omit a discussion of that subject.

Whatever authority the Governor has to remove respondent must be found in section 8 of article 12 of the Constitution. . . .

It is contended that this section is in violation of the amendment of the Constitution of the United States which provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Const. U. S. Amend. 14, sec. 1. . . . To sustain this point it must appear (1) that the removal from office is a deprivation of the respondent of his property; and (2) that it was sought to be accomplished without due process of law.

A public office cannot be called "property," within the meaning of these constitutional provisions. If it could be, it would fol-

low that every public officer, no matter how insignificant the office would have a vested right to hold his office until the expiration of the term. Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they are agencies for the State, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it.

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The legislature may remove officers not only by abolishing the office, but by an act declaring it vacant, as was done by Act No. 140, section 13, Laws of 1891. *Throop* v. *Langdon,* 40 Mich. 673; *Auditors* v. *Benoit,* 20 Id. 184. And it may lodge the power to remove from statutory offices in boards or other officers, subject to statutory regulations. And, while it cannot remove incumbents of constitutional offices, it is not because of an inherent difference in the qualities of the office, but because the power to remove is limited to the power that creates. The constitutional officer is an agent of government. There is the same lack of the ingredients of contract, and the same power to abolish the office or remove the officer by amendment of the Constitution. *City Council* v. *Sweeney,* 44 Ga. 463; *Butler* v. *Pennsylvania,* 10 How. 402.

The fact that some cases hold that removals from office cannot, in some instances, be made, except upon cause shown, upon notice, specific charges, and after a hearing in its nature judicial, does not militate against this doctrine. These cases simply hold that removals are limited by the power of the people or Legislature, through the Constitution or statute; not that a vested property right is involved in the holding of office, or that removal is beyond the power which creates the office and the officer. Nor does it follow that removal from office is a deprivation of the officer of property, because it must be for cause, upon specific charges, and after an opportunity to be heard.

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Again, as all statutory offices are taken subject to legislative action, so all constitutional offices are taken subject to constitutional changes, and both are upon the terms and subject to the conditions existing by law. One of the constitutional conditions upon which the respondent took his office was that he would be subject to removal by the governor, under article 12, section 8. *Frey* v. *Michie,* 68 Mich. 328; *Fuller* v. *Attorney General,* 98 Id. 96.

But conceding, for the argument, that the office is a vested property right, what is the "due process of law" to which the respondent is entitled under the constitutions of this State and of the United States? Counsel contend that it can mean nothing less than a trial by the constitutional judiciary, and perhaps a jury. If so, it must be because the constitutional office differs from the statutory office, as several cases hold that removals from the latter may be made without the intervention of courts. *Dullam* v. *Willson*, 53 Mich. 392; *Clay* v. *Stuart*, 74 Id. 415; *Wellman* v. *Board of Police*, 84 Id. 558, 91 Id. 427; *Fuller* v. *Attorney General*, 98 Id. 96. But this language of the constitutions means less than that. The words "due process of law," as used in the Constitution (article 6, section 32), mean the law of the land, by which are to be understood laws which are general in their operation, and not special acts of legislation passed to affect the rights of particular individuals against their will, *and in a way which the same rights of other persons are not affected by existing law.* *Sears* v. *Cottrell*, 5 Mich. 251. Due process is not necessarily judicial process. Administrative process, which has been regarded as necessary in government, and sanctioned by long usage, is as much due process as any other. *Weimer* v. *Bunbury*, 30 Mich. 201. In this case the treasurer of the city of Niles did not collect and pay over to the county treasurer certain taxes, whereupon, in accordance with the statute, the county treasurer issued a warrant to the sheriff, commanding him to levy and collect the amount from the property of the city treasurer. It was held not to invade article 6, section 32.

The federal decisions also qualify the claim of respondent's counsel.

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From these authorities, it appears that the State is not so bound by the term "due process of law," in the Constitutions, that it is impossible for it to invest its agents with its offices without subjecting itself to the delays and uncertainties of strict judicial action in cases of emergency. While in many cases (and, under the decision in the case of *Dullam* v. *Willson*, perhaps in this) the power of removal is a limited and restricted one, to be exercised along given lines and within prescribed formalities, as already stated, it is not by reason of an inherent right of property in the officer, bringing him within the protection of the fourteenth amendment, but because of the limitations of the law. The Michigan

cases already cited settle for this State the authority of the Governor, under the Constitution.

It is said, however, that the Governor, in this case, made his own charges and employed his own counsel, and is therefore to sit as judge in his own case. One of the duties of the Governor under section 8, article 12, is to investigate the State offices. He is given inquisitorial power, that he may ascertain their condition, for the public welfare. No other means is provided for acquiring the necessary information. . . . . The law does not require a complainant, nor prevent the Governor from committing the interests of the State to competent lawyers, official or otherwise. Finally, the Governor acts judicially upon the accumulated evidence, and such explanations by way of defence as the respondent may offer. In this respect this action is similar to that discussed in *Fuller* v. *Attorney General,* which discussion it is unnecessary to repeat.

We come next to the charges. It is contended that they are insufficient because the act is not alleged to have been intentional, and because it was not gross neglect to permit an erroneous canvass by clerks.

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The only duties of the Board of State Canvassers are to canvass the returns, and determine and certify the result, of elections. Theirs is the culminating act of the army of persons who have had to do with the receiving and counting, recording and transmitting of the votes which signify the will of the people. Section 202 of Howell's Statutes makes it the duty of these officers to attend, and form the Board of State Canvassers. Their duties are specifically pointed out. The times when they are to meet are provided by law. *No provision is made for deputies or clerks,* but all go to show that this important duty is to be performed by them in person, as the certificate signed by them asserts. It is not confided to inferior officials, but to three of the State officers of greatest dignity and importance. It appears to have been the design of the lawmakers to place the votes of the people in the keeping of the most responsible officers of the state; and no argument ought to be necessary to show that it was not expected that the returns would, upon their arrival, be turned over to an irresponsible clerk in the Secretary's office having no official relation to the canvass, whose tabulation should be the canvass, and that the mere signing of their three names to his production should constitute a full compliance

on the part of these officers with the law prescribing the duties of the State canvassers. Section 207 requires an examination by the board of the several statements of the votes, and that *they* make a statement of the whole number of votes cast for each office, while section 209 makes it their duty to certify such statements to be correct. A mere failure to certify could be called "neglect." What shall be said of it when the certificate is made without knowledge of, or any attempt to ascertain the fact? An officer is elected for two years. Who shall count and keep the money of the State, or keep its great seal for two years, is not a matter of vital importance; but an amendment of the Constitution changes, perhaps for all time, the fundamental law, releasing or reclaiming by the people some right or power over the Legislature and officers, the consequence of which may be stupendous. In the present instance, it was a matter of money,—several thousand dollars a year; and, while many may feel that the defeat of this amendment was unfortunate, it is vastly more unfortunate to have the will of the people thwarted, though it be the result of carelessness only, or neglect on the part of the board to perform *the only duty imposed upon them by law.* Looking at the circumstances from his official standpoint, the Governor may well have said this, though not willful, was only possible by reason of the grossest neglect of official duty. It certainly was some one's duty to move at once with a view to the correction of the error, and the prevention of its recurrence.

While there is an inclination upon the part of the average American to accept good intentions as an excuse for mistakes, it is not for the general public good that responsible public offices shall be confided or remain in the custody of those whose duties and responsibilities rest so lightly upon them as to permit the public interests to be injured or endangered through neglect; and when such neglect, from the gravity of the case, or the frequency of the instances, becomes so serious in its character as to endanger or threaten the public welfare, it is gross, within the meaning of the law, and justifies the interference of the executive, upon whom is placed by this amendment, the responsibility of keeping the affairs of State in a proper condition. We cannot think that the term "gross neglect" means any intentional official wrongdoing. Such acts would hardly be described by the word "neglect."

It is said that this section confides great power to the Gover-

nor. This is true; but the governorship is an exalted office,—one which ought to carry with it a presumption of integrity of character and breadth of mind commensurate to its importance. It would be a sad commentary upon free government if it were otherwise. But the powers of the Governor are carefully restricted, and there is no occasion to pursue the elusive phantoms of possibility. When abuses arise, they will doubtless be speedily and effectively met.

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The demurrer must be overruled, and judgment of ouster entered against the respondent.

The other Justices concurred.

The power of removal is not a part of the executive power granted to a state governor by the state constitution. The governor may not therefore remove, even an officer whom he has appointed with the consent of the senate, unless provision for such removal is made in the constitution or the statutes. Field v. People, 3 Ill. 79. This rule is not however applied to the President of the United States who may remove an officer appointed by him with the consent of the senate even though such officer has a term fixed by statute. Parsons v. United States, 167 U. S. 324; Shurtleff v. United States, 189 U. S. 311.

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2. In Absence of Legislative Provision.

STATE EX REL. REDFIELD V. CHATBURN.

Supreme Court of Iowa. June, 1884.

63 Iowa 659.

This action was brought under the provision of chapter 6, title 20, of the Code, to test the right of defendant to hold and exercise the office of sheriff of Shelby county.

It is alleged in the petition that Redfield, the relator, was, on the twenty-sixth of December, 1882, duly and legally appointed sheriff of said county, to fill the vacancy in said office, occasioned by the death of H. W. Patterson, who, at the time of his death, was the legally elected and qualified sheriff of said county, and that on the sixth day of June, 1883, the defendant unlawfully entered into and usurped said office, and continues, without any legal warrant, to exercise the same, by serving and executing the writs, processes and orders of the courts of said county, and by receiving

the profits and emoluments of said office. And the prayer is that he be required to show by what warrant or authority he assumes to hold said office, and that he be ousted and excluded therefrom.

The answer of the defendant admits that a vacancy occurred in said office by the death of said Patterson, and that the board of supervisors of the county, at the time named in the petition, appointed said Redfield to the office, and that he duly qualified. But it avers that the board of supervisors, on the sixth day of June, 1883, as they had the legal right to do, removed said Redfield from said office, and appointed defendant thereto; that he was duly qualified that he entered upon and continues to discharge the duties of said office by virtue of such appointment.

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REED, J. The board of supervisors adopted the order for the removal of the relator from the office, without any formal charge or complaint having been preferred against him. It does not appear that he had any notice of the proceeding until after the order was adopted, nor does it appear upon what ground or for what cause the board assumed to remove him. We will assume, then, that the board proceeded upon the theory that they had the power and right to remove him from the office at their pleasure. Indeed, the claim here urged in support of their action is that, having appointed him to the office, the power to remove him therefrom at their pleasure is conferred upon the board by section 787 of the Code. The section is as follows: "A person appointed as herein contemplated may be removed by the officer appointing. And no person can be appointed who has been removed from office within one year."

It occurs in the chapter of the Code which relates to vacancies in civil offices, and to the manner in which such vacancies are to be filled. It is provided in the preceding sections of the chapter, that an office becomes vacant on the happening of either one of a number of enumerated events, before the expiration of the term of such office, and that vacancies in any of the county offices are to be filled by the board of supervisors. Whatever powers, then, are conferred by the section with reference to the removal from office of a person who has been appointed to fill a vacancy in the office of sheriff, are to be exercised by the board of supervisors.

The single question presented by the record is, whether the board had the power to remove the relator from the office in the

manner in which they attempted to remove him; and we have to say that in our opinion they possessed no such power.

The tenure of office of persons appointed to fill vacancies in office is prescribed and defined by section 6 of article 11 of the constitution of the state. This section is as follows: "In all cases of election to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term, and all persons appointed to fill vacancies in office shall hold until the next general election, and until their successors are elected and qualified."

It seems to us that there can be no doubt or dispute as to the meaning and effect of this language. The section explicitly defines and describes the term of office of a person who is appointed to fill a vacancy in an office.

When the relator was appointed to fill the vacancy occasioned by the death of Patterson, the term of office which he took by virtue of such appointment extended to the time of the general election in the year 1883, and until the election and qualification of his successor. The board had no power to appoint for a term either longer or shorter than that. Their only power in the premises was to fill the vacancy. Section 783. But, when the appointment was made, the term of office of the appointee was prescribed by this section of the constitution, and he acquired the right to hold and exercise the office and enjoy its emoluments during the whole of such term. The language of the section that "he shall hold until the next general election," excludes the idea that his term of office can be made to depend upon the will or pleasure of those who appointed him to it. It imports rather that he holds the office by a certain title, and for a definite term.

It is not doubted that he accepted the office subject to the right of the state to have him removed for any of the causes which by law are made grounds for the removal from office of a public officer. But these causes for removal are all defined by statute. Section 746. As it is not claimed that the removal was made for any of the causes enumerated in said section, we need not inquire whether the board of supervisors have power to remove him for those causes. We are well satisfied that they had no power to remove him at their mere pleasure; and, as this is the only ground on which they assumed to make the order of removal, it is void. The judgment of the district court is therefore,

Affirmed.

EX PARTE CHARLES LEHMAN.

Supreme Court of Mississippi. April, 1883.

60 Mississippi 967.

CHALMERS, J., delivered the opinion of the court.

The order of the court, for disregarding which the relator was imprisoned as for a contempt, was unmistakably an order of removal or suspension from office. It was so treated and regarded by the judge who made it and by the officer who disobeyed it, and such it plainly was.

If there exists under any circumstances power in the circuit courts of this State to remove or suspend from office the clerks of these courts before conviction by a petit jury, their orders assuming to do so must be obeyed until reversed, however wrongful they may be in the particular case; since it is only where a court has undertaken to make an order which it is without jurisdiction to make in any state of the case that its commands may be disregarded with impunity. *Ex parte Wimberly,* 57 Miss. 445. The question presented, therefore, is this, Can a circuit court of this State by its own order, without a trial and conviction of any offence remove, or temporarily suspend from office, for any cause whatever, the circuit clerk of a county?

We have no hesitation in answering this question in the negative—circuit clerks with us are constitutional officers elected by the people for fixed terms of office. By sect. 26 of Art. VI. of the Constitution they are made amenable to indictment or prosecution by a grand jury, and trial by a petit jury for willful neglect of duty or misdemeanor in office, and are to be removed from office when convicted; and this constitutional clause is put in operation and made more effective by sect. 417 of the Code of 1880, which makes it the duty of the court, upon conviction, to adjudge that the party be removed from office, and provides that the vacancy shall be filled as in other cases.

Plainly these constitutional and statute methods of removal are exclusive of all others. The Legislature has not attempted in any portion of our statute laws to provide for the suspension from office of any officer after indictment and pending trial for a criminal offence or a misdemeanor in office. Such a law, if enacted, and if it operated as a practical removal from office before conviction, would be of doubtful constitutionality, since it would give

to an indictment that effect which the Constitution attaches to conviction only, and inflict punishment before trial. The validity of such a statute was upheld in *Allen* v. *The State,* 32 Ark. 241, but repudiated in *Lowe* v. *The Commonwealth,* 4 Metc. (Ky.) 241; *Bunn* v. *Grove,* 6 Bush, 3.

Certainly in the absence of legislation no such power can reside in the circuit court. It is true that the clerk is in many respects the arm of the court, the instrument by which it evidences its will and perpetuates a memorial of its proceedings, but he is an arm created and an instrument furnished by the common master of both, who has provided the appropriate and exclusive method by which each shall be dismissed from his service, and it is no more within the power of the judge to remove the clerk in violation of that method than it is within the power of the clerk to remove the judge.

The circumstances of the present case seem to have presented in their inception a plausible excuse for the action taken by the circuit judge, or, at least, to demonstrate that his action was prompted by the desire to protect the public interests. Four indictments, for falsifying the records of the court by issuing forged witness certificates in State cases for the corrupt and felonious purpose of defrauding the county had already been presented by the grand jury against the clerk, and while this proceeding by *habeas corpus* was pending in the court below nine more indictments for similar offenses were brought in. The clerk was in the official possession of these indictments and of all the evidences by which the State proposed to establish his guilt; but he offered to turn these over to the custody of the appointee of the court, and to yield possession of the office itself so far as to permit its duties in relation to the indictments against himself to be discharged by another. The court declined to modify its order in the manner suggested and insisted upon his unconditional obedience to the order as entered; by which order he was peremptorily removed or suspended from every function and privilege of the office, deprived of all its emoluments, and another person was appointed in his stead.

This order is sought to be upheld by sect. 2279 of the Code, which authorizes the appointing of a clerk or sheriff *pro tempore* when there is a vacancy in the office, or the incumbent is absent or unable to or refuses to discharge the duties of the position; but it is manifest that the section has no application to the facts here

existing. The clerk here was not absent nor did he refuse nor was he unable to discharge the duties of the position, and however unfit he might be morally to occupy such a place this was a question for the voters of the county and not for the judge.

If convicted the law removes him; if acquitted, even upon the doctrine of reasonable doubt, he must remain in office until the expiration of his term. The utmost power of the court was to take care that he should not use his official position to obstruct his own trial or to remove the evidence of his guilt, and with this view its order should have been modified in the manner suggested by the relator. It may be troublesome properly to execute such an order, but while no trouble is too great to insure justice and the infliction of proper punishment, it is better that the greatest criminal should go unpunished than that the Constitution should be violated by those whose first and highest duty is to guard and protect it.

If it need citation of authorities to show that no court can remove or suspend a constitutional officer save after conviction of an offence which authorizes it, it is found in many cases and denied by none. *Hyde* v. *The State,* 52 Mass. 675; *Page* v. *Hardin,* 8 B. Mon. 673; *Newson* v. *Cock,* 44 Miss. 362; *Lowry* v. *Tullis,* 32 Miss. 147; *Honey* v. *Graham,* 89 Tex. 11; *Cury* v. *Stewart,* 8 Bush, 563.

Our conclusion is that, inasmuch as there is no state of facts which will make valid an order of removal before conviction, the relator was not guilty of contempt in disregarding the order made in this case. Wherefore, the judgment of the court below is reversed and the relator discharged.

THE STATE EX REL. ATTORNEY-GENERAL V. SAVAGE.

Supreme Court of Alabama. November, 1889.

89 Ala. 1.

CLOPTON, J. This case, which is an impeachment proceeding against R. R. Savage, judge of probate of Cherokee county, instituted in this court, is submitted on a motion to quash the information on the fourth, fifth, ninth and tenth grounds, and on a demurrer to the other grounds.

In respect to the impeachment of public officers, a jurisdiction not theretofore existing is created by the Constitution and statutes, and the mode of its exercise provided, to which the proceeding must substantially conform. Section 4840 of Code 1886 provides: "It shall be the duty of the Attorney-General to institute proceedings under this chapter, and prosecute the same against any officer included in section two, article seven of the Constitution [which includes judges of probate], when the Supreme Court shall so order, or when the Governor shall, in writing, direct the same, or when it appears from the report of any grand jury that any such officer ought to be removed from office, for any cause mentioned in the first section of this chapter." The causes mentioned are: "Willful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude, while in office, or committed under color thereof, or connected therewith." Section 4818. Whether such proceedings shall be instituted is not rested on the discretion of the Attorney-General; authorization in one of the statutory modes is essential to uphold the proceeding. The present information purports to be founded on the report of a grand jury.

The fourth and fifth objections are substantially the same, though varied in form; namely, it does not appear that the alleged report was made by a grand jury of Cherokee county to the Circuit Court for that county. The information recites that the proceeding is instituted on the report of a duly organized grand jury of Cherokee county; that it was made in the Circiut Court for the July term, 1889, and entered on the minutes of the court, and that a certified copy which accompanies the information, was transmitted to the Attorney-General. When the information refers to the report of a grand jury, and is accompanied by it, as the authorization, this is *prima facie* sufficient to uphold the proceeding without the contents being specifically set forth in the information itself.

The ninth and tenth grounds of the motion are, that the facts constituting the misconduct with which the defendant is charged are not set forth in the report of the grand jury, as required by the statute. Section 4839 of the Code declares: "It shall be the duty of every grand jury to investigate and make diligent inquiry concerning any alleged misconduct or incompetency of any public officer in the county, which may be brought to their notice; and if, on such investigation and inquiry, they find that such of-

ficer, for any cause mentioned in this chapter, ought to be removed from office, they shall so report to the court, setting forth the facts, which shall be entered on the minutes." It was held in *State* v. *Sewell*, 64 Ala. 235, that setting forth the facts in the report is essential to the authority of the prosecuting officer to institute such proceeding; and though the facts need not be set forth with the accuracy usually required in pleading, unless the report sustains a succinct statement, showing the nature and description of the acts of the official misconduct charged, it is insufficient to uphold the proceedings. In that case, the defendant was charged with extortion and corruption in office, which are conclusions of law from facts which may differ in different cases. The report of the grand jury on which the present information is based, is as follows: "In the discharge of our duties as a grand jury, we find, and do hereby report, that R. R. Savage, judge of probate in and for the county of Cherokee, ought to be impeached and removed from such office, for and on account of his habitual drunkenness while in such office, prior to and down to the time of making this report." No greater fulness of description of the acts, and less accuracy of statement, is required in such report, than in an indictment.

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The motion is overruled as to fourth, fifth, ninth and tenth grounds, and the demurrer to the other grounds is sustained.

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3. Incident to Power of Appointment.

EX PARTE, IN THE MATTER OF HENNEN.

Supreme Court of the United States. January, 1839.

13 Peters 230.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an application for a rule upon the Honorable Philip K. Lawrence, Judge of the District Court of the United States for the eastern district of Louisiana, to show cause why a *mandamus* should not be issued against him, requiring him to show cause why he should not restore Duncan H. Hennen to the office of clerk of the said district court.

The petition sets forth that the petitioner, Duncan H. Hennen, on the 21st day of February, in the year 1834, was duly appointed clerk of the said court, by the Honorable Samuel H. Harper, judge of the said court. That a commission was duly issued under the hand and seal of the judge. That he accepted the appointment, and gave the bond with sureties required by law, and thereupon entered upon the duties of the office, and continued to discharge the same methodically, skillfully and uprightly, and to the satisfaction of the District Court. That by virtue of said appointment, and of the provisions of the statute in such case made and provided, he was from the period of the organization of the circuit court of the United States for the said district of Louisiana, in like manner the clerk of said circuit court; and performed all the duties of said office. That he continued to perform the said duties, and receive the emoluments, and in all respects to hold and occupy said offices, until on or about the 18th day of May, in the year 1838, when he received a communication from the Honorable Philip K. Lawrence, then and now the judge of the said district court of the United States, for the said eastern district of Louisiana, apprizing him of his removal from the said office of clerk, and the appointment of John Winthrop in his place. And in this communication he states, unreservedly, that the business of the office for the last two years has been conducted promptly, skilfully, and uprightly, and that, in appointing Mr. Winthrop to succeed him, he had been actuated purely by a sense of duty and feelings of kindness towards one whom he had long known, and between whom and himself the closest friendship had ever subsisted. And that, as his capacity to fill the office cannot be questioned, he felt that he was not exercising any unjust preference, in bestowing on him the appointment. The petition further states that Judge Lawrence did, on or about the 18th day of May, in the year 1838, execute and deliver to the said John Winthrop a commission or appointment, as clerk of the said district court for the eastern district of Louisiana; and that he does to a certain extent execute the duties appertaining to the said office, and is recognized by the said judge as the only legal clerk of the said district court.

The petition further states, that on or about the 21st day of May, in the year 1838, the circuit court of the United States for the eastern district of Louisiana, met according to law; when the Honorable John McKinley, one of the associate justices of the

Supreme Court of the United States, and the said Judge Lawrence, appeared as judges of the said circuit court, and that the petitioner and John Winthrop severally presented themselves, each claiming to be rightfully and lawfully the clerk of the said circuit court; that the judges differed in opinion upon the said question of right, and being unable to concur in opinion, neither of said parties was admitted to act as clerk, or recognized by the court as being rightful clerk; and no business was or could be transacted, and the court adjourned.

The petitioner claims that he was legally and in due form appointed clerk of said district court; and by virtue of said appointment became lawfully clerk of said circuit court. And that he has never resigned the said offices, or been legally removed from the same, or either of them. But that he is illegally kept out of the said office of clerk of the said district court, by the illegal acts and conduct of the said Philip K. Lawrence, judge as aforesaid, and the said John Winthrop, claiming to hold said office under an appointment from the said Judge Lawrence; which he is advised and believes is illegal and void. And prays that the court will award a writ of *mandamus*, directed to the said judge of the said district court, commanding him forthwith to restore the petitioner to the office of clerk of the said district court for the eastern district of Louisiana.

The district judge has appeared by counsel to oppose this motion, and the facts set out in the petition have not been denied. And the question presented to the court is, whether the petitioner has shown enough to entitle him to a rule to show cause why a *mandamus* should not issue. If he has been legally removed from the office of clerk, there are no grounds upon which the said motion can be sustained.

By the Constitution of the United States, art. 2, sec. 2, it is provided that the President shall nominate, and by and with the advice and consent of the Senate, shall appoint certain officers therein designated, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they shall think proper, in the President alone, in the courts of law, or in the heads of departments. The appointing power here designated in the latter part of the section was no doubt intended to be exercised by the department of the government to which the officer to be ap-

pointed most appropriately belonged. The appointment of clerks of court properly belongs to the courts of law; and that a clerk is one of the inferior officers contemplated by this provision in the Constitution cannot be questioned. Congress, in the exercise of the power here given, by the act of the 24th of September, 1789, establishing the judicial courts of the United States, 1 Story's Laws, U. S. 56, s. 7, declares that the Supreme Court, and the district courts shall have power to appoint clerks of their respective courts; and that the clerk for each district court shall be clerk also of the circuit court in such district.

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Such then being the situation in which the petitioner stood prior to the 21st of May, 1838, the question arises whether the district judge had power to remove him, and appoint another clerk in his place.

The Constitution is silent with respect to the power of removal from office, where the tenure is not fixed. It provides, that the judges, both of the supreme and inferior courts, shall hold their offices during good behavior. But no tenure is fixed for the office of clerks. Congress has by law limited the tenure of certain officers to the term of four years, 3 Story, 1790; but expressly providing that the officer shall, within that term, be removable at pleasure; which of course, is, without requiring any cause for such removal. The clerks of courts are not included within this law, and there is no express limitation in the Constitution, or laws of Congress, upon the tenure of the office.

All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.

It cannot, for a moment, be admitted, that it was the intention of the Constitution, that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made. In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.

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In all . . . departments power is given to the secretary

to appoint all necessary clerks; 1 Story, 48; and although no power to remove is expressly given, yet there can be no doubt, that these clerks hold their office at the will and discretion of the head of the department. It would be a most extraordinary construction of the law, that all of these offices were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department: the President has certainly no power to remove. These clerks fall under that class of inferior officers, the appointment of which the Constitution authorizes Congress to vest in the head of the department. The same rule, as to the power of removal, must be applied to offices where the appointment is vested in the President alone. The nature of the power, and the control over the officer appointed, does not at all depend on the source from which it emanates. The execution of the power depends upon the authority of law, and not upon the agent who is to administer it. And the Constitution has authorized Congress in certain cases to vest this power in the President alone, in the courts of law, or in the heads of departments; and all inferior officers appointed under each, by authority of law, must hold their office at the discretion of the appointing power. Such is the settled usage and practical construction of the Constitution and laws, under which these offices are held.

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And the same rule has governed the decisions of the state courts in this country, whenever the power of appointment and tenure of office has been drawn into discussion. The questions have been governed by the constructions given to the constitution and laws of the state where they arose.

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The law giving the district courts the power of appointing their own clerks, does not prescribe any form in which this shall be done. The petitioner alleges that he has heard and believes that Judge Lawrence did, on the 18th day of May, 1838, execute and deliver to John Winthrop, a commission or appointment as clerk of the district court of the eastern district of Louisiana, and that he entered upon the duties of the office, and was recognized by the judge as the only legal clerk of the district court. And in addition to this, notice was given by the judge to the petitioner, of his removal from the office of clerk, and the appointment of Winthrop in his place; all which was amply sufficient, if the

office was held at the discretion of the court. The power vested in the court was a continuing power; and the mere appointment of a successor would, *per se,* be a removal of the prior incumbent so far at least as his rights were concerned. How far the rights of third persons may be affected is unnecessary now to consider. There could not be two clerks at the same time. The offices would be inconsistent with each other, and could not stand together. If the power to appoint a clerk was vested exclusively in the district court, and the office was held at the discretion of the court, as we think it was; then this court can have no control over the appointment or removal, or entertain any inquiry into the grounds of removal. If the judge is chargeable with any abuse of his power, this is not the tribunal to which he is amenable; and we have no right to judge upon this matter, or power to afford redress if any is required, we abstain from expressing any opinion upon that part of the case.

The motion is accordingly denied.

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4. Removal for Cause.

IN THE MATTER OF GUDEN.

Court of Appeals of New York. June, 1902.

171 N. Y. 529.

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Charles Guden, the petitioner, was elected sheriff of Kings county at the election in 1901, and thereafter duly qualified and took office. Subsequently, charges having been preferred against him, alleging acts of misconduct committed prior to his election, the governor, after a hearing, ordered his removal from office, and appointed Norman S. Dike, in his stead, who, acting under his certificate of appointment, took possession of certain books and papers appertaining to the office of sheriff. The petitioner, asserting that his removal was violative of the provisions of the state constitution, and so, ineffective, instituted this proceeding.

PARKER, Ch J.

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. . . . . The power of removal . . . in this state . . . has been invested in the governor by the people. Constitution, art. IV, § 1. The constitution further specifically provides and has since 1821 in effect, and since 1846 in precisely the same words—that "the governor may remove any officer, in this section mentioned, (sheriffs, clerks of counties, district attorneys and registers in counties having registers), within the term for which he shall have been elected; giving to such officer a copy of the charges against him; and an opportunity of being heard in his defense." Art. X, § 1.

. . . . . .

If the intent of the framers of the constitution was not plainly apparent from the language of the clause, all doubt would be removed by an examination of the debates of the constitutional conventions of 1821 and 1846.

Prior to the constitution of 1821 the office of sheriff had not been elective but an appointive one. Under the constitution of 1777 the appointments were made by a council consisting of the governor and one member from each of the four great senate districts of the state. The manner in which the power was exercised became the subject of such grave abuse that the convention of 1821 set about accomplishing a needed correction. The final result was that the electors of the several counties were authorized to choose the sheriffs by ballot, and upon the governor was conferred the power of removal in language substantially like that in existence in the constitution of to-day.

An examination of the debates of that convention seems to indicate that the propriety of vesting the power of removal in the governor was not questioned. A difference of opinion *did* prevail as to the advisability of requiring notice and an opportunity to be heard before removal.

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The suggestion that, if the courts do not interfere, some executive may proceed in disregard of those principles which courts of impeachments have established, should not be given weight, for the ability to act quickly in the removal of administrative officers and clerks is as important in the conduct of government as in the management of a gigantic corporation or large individual enterprise.

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Of the manner in which that power has been exercised there

has been but little complaint in the more than eighty years that have passed since the power was first granted. Delegate Becker of the constitutional convention of 1824, seems to have been of the opinion that the governor should not have an absolute and unconditional power of removal that might be exercised without a sufficient reason, and so he proposed in due form an amendment to the section of the constitution under consideration, which should insert therein after the word "remove" the words "for good cause shown," but the proposed amendment was rejected, and without debate, so far as the record discloses.

But had there been large complaint concerning the exercise of the power the method of removal inbedded in the constitution must govern until the people change it. It authorizes the governor to remove, as we have seen, after "giving to such officer a copy of the charges against him and an opportunity of being heard in his defense," and an examination of the record discloses that such requirements of the constitution were fully complied with in this case.

Therefore, we do not examine into the merits, for they do not concern the courts, inasmuch as both the power to decide whether Guden should be removed from the office of sheriff, and the responsibility for a right decision, rest solely upon the governor of the state.

The order should be affirmed, with costs.

O'BRIEN, J. I concur with Chief Judge Parker in the result. My conclusion, however, is based on grounds somewhat different from those stated in his opinion, and, briefly, my reasons are these:

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. . . . . It is admitted on all sides that before a removal can be made the governor must acquire jurisdiction. These must be a charge of some official misconduct on the part of the officer and he must have been served with a copy of the charge and given an opportunity to be heard. A mere statement in writing, of some act or omission on the part of the officer, that in no sense can constitute misconduct, would not be a charge within the meaning of this provision of the constitution. It is not necessary that the charge be stated with all the precision of a pleading in a court of law or equity. The governor has power to prescribe his own rules of procedure and determine whether the charge is sufficiently specific or otherwise, but there must be some act or

omission on the part of the officer stated in the papers, which amounts to official misconduct, and when such a paper is presented to the governor he acquires jurisdiction of the person of the officer and of the subject matter of the charge. For any error of law or fact that he may commit in the progress of the investigation there is no power of review in the courts. The courts can inquire with reference to a single question only and that is the jurisdiction; but the power to inquire as to jurisdiction necessarily implies the right to examine into the nature and character of the charge, in order to see whether it is in any proper sense a charge at all within the meaning of the constitution.

In my opinion, the charges in this case were sufficient to confer jurisdiction upon the governor.

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It was not necessary that the order of removal should specify the particular acts for which the removal was made. The order necessarily includes all acts embraced in the charges and covered by the proofs just as the general verdict of a jury includes all the facts comprehended in the issue submitted, and the validity of the judgment indicated by the order of removal is not affected by the circumstances that the executive instead of specifying the particular acts of misconduct of which the sheriff was charged and found guilty, expressed his reasons in a milder form, namely, that it appeared to his satisfaction that the usefulness of Guden in the office of sheriff of the county is at an end and that he be removed from the office.

GARY, HAIGHT, VANN, CULLEN, and WERNER, JJ. (O'BRIEN, J., in result in memorandum), concur with PARKER, Ch. J.

Order affirmed.

Some cases, however, hold that misconduct prior to the beginning of the existing term of office is not a ground for removal under a power to remove for cause. See e. g. Thruston v. Clark, 107 Cal. 285.

See also Dullam v. Wilson, 53 Mich. 392, which holds that a hearing must be given where the power to remove may be exercised only for cause.

THE STATE EX REL. WILLIAMS V. KENNELLY.

Supreme Court of Errors of Connecticut. July, 1903.
75 Connecticut 704.

HAMERSLEY, J. This is an information in the nature of a *quo warranto*, filed by the State's attorney at the relation of Charles E. Williams, charging the respondent, Patrick Kennelly, with usurping the office of director of public works of the city of Bridgeport. The information alleges that the mayor of Bridgeport, under and in pursuance of the charter of that city, on May 26th, 1900, appointed the relator director of public works for the term of four years from June 1st, 1900, that the relator duly qualified and entered upon the duties of the office, and that the respondent has since May 19th, 1902, illegally usurped and still continues to usurp said office.

The answer admits the appointment of the relator on May 26th, 1900, and that the respondent now occupies and exercises said office, and alleges that he exercises said office by virtue of an appointment thereto by the mayor of Bridgeport, and further alleges the following facts, namely: The said mayor summoned the relator to appear before him on April 30th, 1902, to answer to charges of incompetency and negligence in performing the duties of his office, and particularly, to the following charges, to wit: that he had been and still was interested in the compensation paid for stone furnished the city during his term of office by the Williams & Dewhirst Company; that he employed one Dewhirst as assistant and subordinate, who was interested in the compensation so paid for stone furnished by said Williams & Dewhirst Company, knowing that he was so interested; that he negligently permitted the stone so purchased of the Williams & Dewhirst Company to be furnished the city without having any representative of the city, other than an officer of said company, to supervise the measurement of the stone, and without any method or system by which the quality of stone so furnished could be accurately determined, and had thereby caused the city to be defrauded and damaged; that in answer to said summons the relator appeared before the mayor, with counsel, and heard and examined the witnesses who testified in support of the charges, and offered such evidence and arguments as he desired; that on May 19th, 1902, and after said hearing, the mayor found that said charges were true, and

that sufficient cause existed for the removal of the relator from office, and did therefore remove the relator from his said office; and that afterwards, and on May 19th, 1902, the mayor appointed the respondent to fill the vacancy created in the office of director of public works by said removal of the relator.

The replication admits the summons and hearing as alleged in the answer, and also that after said hearing the mayor did assume to remove the relator from office, setting forth his reasons therefor as alleged in the answer, and did assume to appoint the respondent to said office as alleged; and alleges that the removal the mayor thus assumed to make is illegal and void, because, first, no evidence was produced on said hearing to legally substantiate the charges, and no legal cause for the relator's removal was in fact shown on said hearing; second, the mayor did not remove the relator for any legal cause whatever, but removed him solely for political reasons; third, said hearing was not a fair and lawful one because the mayor, before and after the hearing, in the absence of the relator consulted with and was advised and influenced by the attorneys who represented the prosecution of said charges and the persons interested in having the relator removed for political reasons only.

The respondent demurred to this replication and the trial court sustained the demurrer. The relator claims that the court erred in sustaining the demurrer, and this is the only question raised by the appeal.

The charter of the city of Bridgeport as revised in 1895 (12 Special Laws, p. 515) provides, among other things, (section 32) that "the mayor of the city shall be the chief executive officer thereof, and it shall be his duty to be vigilant and active in causing the laws to be executed and enforced within the city;" and that (section 11) the common council shall consist of the mayor and twenty aldermen. Various powers and duties are assigned to subordinate executive boards, including the board of public works, of which boards the mayor is a member and chairman, but without the power of voting unless in case of tie. The members of each of these boards are appointed by the mayor (sections 17, 19) to hold office for a definite term, unless sooner removed for cause. Any member of these boards may be removed by the common council by a two-thirds vote, for cause (sections 17, 19). It is the duty of the mayor to fill by appointment any vacancies in offices in all cases in which he is given the power

to appoint (section 32), and to perform all duties imposed upon him by the charter and ordinances of the city, the laws of the State, and of the United States. The general clause applicable to all officers appointed under the charter, limits their respective terms to their removal from office.

It seems evident from the language used, in connection with other provisions of the charter, that this mode of removal does not depend on an exercise of that *quasi*-judicial power to hear and determine official offenses punishable by a forfeiture of office, as in the case of the amotion of a corporate officer by a municipal corporation for some offense which forfeits his right to the office, or the deprivation of an ecclesiastical corporation for a similar offense, or where an administrative board is authorized to punish in this way some misfeasance in office. Removals dependent on the conviction or *quasi*-conviction of some offense are otherwise provided for. Section 41 of the charter authorizes the common council to enact ordinances relative to the removal or expulsion from office of any officer on account of corruption or misfeasance therein. Section 80, in authorizing the boards of fire and police commissioners to remove a fireman or policeman, specially provides for a hearing had in open session. Section 85, in authorizing the mayor to remove a member of the board of apportionment and taxation, requires a conviction of some corrupt practice.

Although the power of removal may be limited by the necessity of assigning some cause, or of informing the officer removed of the cause of his removal and giving him an opportunity for explanation, and stating the ground for removal, the act belongs rather to the field of executive discretion than to that of *quasi*-judicial finding; and the action of the removing officer complying with the limitation is final. *People ex rel. Keech* v. *Thompson*, 94 N. Y. 451; *People ex rel. Gere* v. *Whitlock*, 92 Id. 191, 197; *State ex rel. Kennedy* v. *McGarry*, 21 Wis. 502, 503; *People* v. *Martin*, 19 Colo. 565; *State ex rel. Attorney-General* v. *Hawkins*, 44 Ohio St. 98, 115.

In 1899 (13 Special Laws, p. 376) the city charter was amended by abolishing the board of public works and giving the powers and duties assigned to that board to the "director of public works, and the amendment provided that this officer should be appointed by the mayor for a term of four years, unless sooner removed by the mayor for cause.

Considering all the provisions of the charter as thus amended,

we think the removal of this officer is a mode of exercising this power of removal incident to executive appointment, and that the limitation placed on its exercise is satisfied, possibly more than satisfied, when the mayor has stated to the officer the cause which induces him to contemplate his removal, being a proper and sufficient cause, has given him an opportunity to be heard in relation thereto, and assigns this cause in making the removal.

It follows that the facts alleged in the answer and admitted by the replication establish a valid removal of the relator, and a valid appointment of the respondent. The affirmative allegations of the relator's replication are immaterial and irrevelant, because, if true, they do not alter the fact of the relator's removal from office. *Avery* v. *Studley,* 74 Conn. 272; *Hoboken* v. *Gear,* 27 N. J. L. 265, 286-288. An executive removal may be unjust and induced by reprehensible motives, but it is not therefore invalid. The executive discretion, whether in appointment or removal, is absolute. The person abusing that discretion may be punished, but not by judicial reversion of his official action. When the absolute discretion, whether in appointment or removal, is limited by law, while the due observance of those limits may be enforced, yet the action of the executive within the limits prescribed cannot be controlled by the court.

Whether the validity of executive appointment or removal should or could be made to depend on prior judicial trial and finding under the rules governing judicial trials, and subject to be reviewed and set aside by the court for errors in the conduct of the trial and upon the absence of any controlling improper motive inducing the executive action—absence of such motive to be determined by the court—are questions not before us. Such judicial control or executive action has heretofore been deemed inconsistent with the efficient performance of executive duties. The relator's claim seems to assume that the city charter, in authorizing the mayor to appoint a director of public works for a term of four years, or until sooner removed by him for cause, and upon his removal to appoint another to fill the vacancy, requires, as an essential condition precedent to any removal, the existence of a sufficient cause to be judicially found as a fact, and declares a removal following such cause and assigning the same as its reason, to be void, if in fact the inducing motive is not the existing cause assigned, but a desire to have the office filled by a member of the mayor's

own political party; and that the Superior Court, upon proceedings in the nature of *quo warranto,* is made the final judge of the sufficiency of the cause and its existence as a fact, and of the operating motive of the mayor in making the removal.

This assumption is plainly unfounded. The demurrer was properly sustained.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

Under § 2140, New York Code of Civil Procedure, as interpreted by the courts, People ex rel. Masterson v. French, 110 N. Y. 494, *infra,* the courts are empowered to reverse on *certiorari* proceedings, a determination to remove an officer, removable only for cause and after a hearing, on the ground that such a determination is opposed to the preponderance of proof.

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5. Power of Suspension.

GREGORY V. MAYOR, ETC.

Court of Appeals of New York. April 16, 1889.

113 N. Y. 416.

PECKHAM, J.

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The trial judge was amply justified by the evidence in holding, as a fact, that the plaintiff never received any notice of dismissal, and we are concluded by such finding. The only question that is left for discussion is, whether the resolution of the commissioners of excise, which assumed to suspend the plaintiff indefinitely, and without pay, from the performance of his duties was authorized. It is claimed that the power of the commissioners to suspend their employes was included in the conceded power to remove them.

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. . . . . Whether the power to remove includes the power to suspend, must, as it seems to us, depend, among other things, upon the question whether the suspension in the particular case would be an exercise of a power of the same inherent nature as that of removal, and only a minor exercise of such power, or whether it would work such different results that no inference of its existence should be indulged in, based only on the grant of

the specific power to remove. We think it is apparent that the two powers cannot always be properly respectively described as the greater and less, and, consequently, it cannot always be determined, simply upon that ground, that the suspension is valid because there was a power to remove. The power to remove is the power to cause a vacancy in the position held by the person removed, which may be filled at once, and if the duties are such as demand it, it should be thus filled. The power to suspend causes no vacancy and gives no occasion for the exercise of the power to fill one. The result is that there may be an office, an officer and no vacancy, and yet none to discharge the duties of the office. By suspension the officer is prevented from discharging any duties, and yet there is no power to appoint anyone else to the office because there is no vacancy. If it be claimed that the power to suspend includes also the power to fill the place of the officer suspended during such suspension, then there is a second presumed power which flows from the simple power to remove. There is the power to suspend and there is the further power to be implied from it, viz., the power to fill the office with another during such suspension, although there is no vacancy in the office.

We do not think either of these last-named powers should be implied in the mere grant of the power to remove. We are not inclined to go so far with the doctrine of implied grants of power, because we think the implication is not one which naturally or necessarily arises out of the nature of the main power granted, and its denial in such cases as this can, as we think, work no possible mischief. We do not go to the extent of saying that in no conceivable case can the power to suspend be inferred from a grant of the power to remove. There may be cases where such an interference, arising from the general scope and nature of the act granting the power, would be so strong as to compel recognition. We think there is no such inference to be drawn in the case before us.

The plaintiff held the position of excise inspector and it was his business, as he described it, "to go 'round to different places where liquor was sold and see if the sellers were licensed and if they were not, that they should get one; also to see that the sale of intoxicating liquors in the city of New York was carried on properly." These duties were, necessarily, to be discharged out of the sight of the commissioners. Upon the fidelity and prudence with which such duties were discharged depended, in great part,

the proper enforcement of the law. The commissioners might believe that the inspector was not doing his duty, and yet be unable to show exactly wherein he failed. Proof thereof on charges, to be regularly preferred, would amount almost to a denial of the power to remove, because, the duties being of such a nature as above described and to be performed beyond the view of the commissioners, the inference of a failure to perform them might be based upon such a number of disconnected facts that it would not be regarded as justified upon a regular trial. Hence the necessity of a power to remove when the commissioners might feel that there had been a dereliction of duty without being able to point out any specific fact as evidence thereof, while the power of indefinite suspension, without pay, would not add anything to the security of the city or the power of the commissioners to obtain honest service. If the employe were unfit, it would be the duty of the commissioners to remove him at once. If not unfit, he should not be suspended indefinitely, without pay.

It seems to us that the power of removal in such a case as this was entrusted to the commissioners to be exercised, if at all, at once and finally. It was not meant that they should have power to arbitrarily suspend without pay, and then appoint some other in the place of the suspended man, and perhaps suspend or remove the alternate and again appoint some other. The tendency would be to confuse instead of perfecting the service. The effect upon the suspended man would also be demoralizing, causing him to expend his time in efforts to get reinstated rather than in endeavors to procure a livelihood in other ways, which would be the result of a removal. As the existence of the power to suspend depends upon our inferring it from the grant of the power to remove, all of the views above suggested may properly be regarded as bearing upon the question whether there is any inherent necessity for an inference of such a nature. The constitution of our state, in section 3 of article 5, in providing for the appointment of a superintendent of public works, says that, "he may be suspended or removed from office by the governor, whenever," etc. In section 4 of the same article provision is made for the appointment of a superintendent of state prisons, and it is stated that "the governor may remove the superintendent for cause at any time," etc. Has the governor power to suspend in both cases? This difference of language in the organic law rather tends to the idea that the framers of these two provisions were not entirely

sure that the power to remove included the power to suspend, or that the latter power was always of the same nature and only less in extent than the former.

We think the commissioners had no power to suspend the plaintiff, and that the frequent attendance of the plaintiff at the office of the board, and his continuous offers to discharge the duties of the position to which he had been appointed, were sufficient tenders of performance on his part to warrant the conclusion of the learned trial judge in directing the verdict.

We see no errors in the record and the judgment should be affirmed, with costs.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

Cf. Wardlaw v. Mayor, 137 N. Y. 194, *supra.*

STATE EX REL. DOUGLAS V. MEGAARDEN.

Supreme Court of Minnesota. December, 1901.
85 Minnesota 41.

LOVELY, J.

Quo warranto upon the information of the attorney general in behalf of the state against Philip T. Megaarden, sheriff of Hennepin county, to oust him from the possession of that office during the proceedings before the governor for his removal.

Respondent demurred to the information, which issue presents two questions: (1) Are the allegations of the information sufficient to show that the executive was authorized to order an investigation for the removal of the sheriff? (2) Did the order for such investigation authorize the governor to suspend the sheriff during the course of the procedure for his removal?

1. The information alleges that respondent was elected sheriff of Hennepin county at the general election of 1900; that he qualified and entered upon the office in January, 1901; that the public examiner subsequently made an examination into his official affairs for the years 1899, 1900 and 1901; that on November 25, 1901, the examiner reported to the governor that the sheriff had made improper charges against the county in excess of legal right, and had collected the same on verified claims presented to the board of county commissioners.

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2. The governor acted upon the complaint of the examiner, appointed a commission as provided in G. S. 1894, § 894, and fixed a time for the return of their report. He also made an order sustaining the sheriff during the proceedings for removal, of which due notice was given, but respondent has ever since continued in possession of the office in defiance of the order of suspension. Whether he was right or wrong in this respect is the important question before us, involving the power of the governor to make the order of suspension.

. . . . . .

No right to suspend is given in express terms. If such power exists, it must be implied; hence the question still remains, can the governor, upon the ordering of the commission, suspend the officer during the investigation?

While the right to remove under the law of sister states is in many instances conferred by statutes quite similar to ours, yet the authorities in respect to the incidental right to suspend pending the hearing are meager and unsatisfactory. We have been referred to several cases by counsel for respondent, but found them of little assistance.

The best considered case relied upon by counsel, in which it has been held that the power of suspension was not an incident to the power of removal is *Gregory* v. *Mayor*, 113 N. Y. 416, 21 N. E. 119. . . . This case is not in point here, where the temporary vacancy created by the suspension of a county officer is made, pending a hearing, which may terminate in his favor, with reinstatement to the duties and emoluments of the office. The only value of this opinion is derived from the fact that it was written by a very able jurist, who reviews the authorities, but distinguishes them from the question now presented to this court.

Most of the authorities cited for the state are either distinguishable from the case before us, or go upon an assumption of the incidental right to suspend without furnishing such reasons for its existence as would render them of paramount weight on this review. The case of *State* v. *Peterson*, 50 Minn. 239, 52 N. W. 655, was on *quo warranto* to remove a county treasurer, conducted under laws 1881, c. 108 (G. S. 1894, §§ 909-913), which in express terms provides for the suspension of that officer pending his removal.

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In the Peterson case the court referred to the only precedent we

have found directly in point on this question, viz. *State* v. *Police*, 16 Mo. App. 48, 50. This court in the Peterson case quoted therefrom with respect language of such importance to the questions here involved that we take the liberty of reproducing it on account of its practical suggestive force. Premising that in the Missouri case the right to suspend the official depended upon a power conferred solely by statute, the court said: "The suspension of an officer, pending his trial, for misconduct, so as to tie his hands for the time being, seems to be universally accepted as a fair, salutary, and often necessary incident of the situation. His retention, at such time, of all the advantages and opportunities afforded by official position may enable and encourage him not only to persist in the rebellious practice complained of, but also to seriously embarrass his triors in their approaches to the ends of justice. In the absence of any express limitation to the contrary—and none has been shown—we are of opinion that in cases where guiltiness of the offense charged will involve a dismissal from office there is, on general principles, no arbitrary or improper exercise of a supervisory authority in a suspension of the accused pending his trial in due and proper form."

The reasons stated in the above case for holding that the right of suspension during proceedings for removal seem to be so essential to a complete and thorough investigation of an official charged with misconduct as to furnish an unanswerable argument to the claim of respondent that the minor right to suspend is not included in the major authority to remove.

. . . . . .

It ought not, therefore, to be held that the unquestionable power to remove should be so handicapped by an interpretation of the statute as to defeat the very object it seeks to attain. Presumably the chief executive of the state will act upon an exalted sense of justice and high considerations of duty, and only in cases where strong reasons exist for exercising the power of suspension will impose unnecessary burdens upon the accused official after a sufficient review of the reasons upon which that power is to be exercised.

The order to suspend should not prejudice the respondent in any way. He is entitled to a fair hearing, with all the presumptions of innocence and good intentions in his favor. These ought to continue until the termination of the investigation and the final action of the governor, but we are compelled to adopt the view

that, to give the power of removal practical effect, it must be left to executive discretion and judgment to direct a temporary suspension of the official, as so ordered in this case.

Let the writ of ouster issue as prayed for.

IV. Impeachment.

TRIAL OF ANDREW JOHNSON.

In the Senate of the United States. 1868.

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Opinion of Mr. Senator Davis.

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Our system of impeachment has not been transferred from any other government, nor was its organization confided to Congress; but the cautious statesmen who founded our government incorporated it in and built it up as part of the Constitution itself. They enumerated its essential features and made it *sui generis*. 1. No person but civil officers of the United States are subject to impeachment. 2. The Senate is constituted the court of impeachment. 3. The Chief Justice of the United States is to preside over the court when the President is upon trial, and the Vice-President or the President *pro tempore* of the Senate in all other cases. 4. No conviction can take place unless two-thirds of the senators present concur. 5. No impeachment can be made but for treason, bribery or other high crimes and misdemeanors against the United States. 6. Judgment of impeachment cannot extend to death or other corporal punishment, or fine or imprisonment; but is restricted to removal from and disqualification to hold office; but the party convicted nevertheless to be liable and subject to indictment, trial, judgment, and punishment according to law. The offenders, offences, court and punishment are all distinctly impressed with political features.

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The Senate now and for this occasion is a *court* of impeachment for the trial of the President of the United States, and, like all other courts, is bound by the law and the evidence properly applicable to the case.

. . . . . .

One of the leading and inflexible laws which bind this court is embodied in the Constitution in these words:

"No person shall be removed from office but on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."

That is the category of all impeachable offences, and they must be acts declared by the law of the United States to be treason or bribery, or some other offence which it denominates a "high crime or misdemeanor." The laws which define impeachable offences may be the Constitution, or acts of Congress, or the common law, or some other code, if adopted either by the Constitution or act of Congress. No common-law offence, as such merely, can sustain the impeachment of any officer; but to have that authority it must have become a part of the law of the United States by being adopted by the Constitution or some act of Congress, and would have operation and effect only to the extent that it was consistent with the provisions, principles and general spirit of the Constitution.

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It results from this view of the law of impeachment, that as none of the articles against the President charge him with treason or bribery, which are made impeachable offences by the Constitution, they, or some of them, must allege against him the doing of an act or acts which a law of Congress has declared to be an offence against the United States, and denominated it to be, and in its vicious nature it must be a high crime or misdemeanor, and that the President did that act with a criminal intent to violate the law, to authorize this court to convict him and to pronounce judgment that he be removed from office.

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The impeachment of the President of the United States is the arraignment of the executive department of the government by one branch of the legislative department and its trial by the other. The incongruity of such a responsibility and consequent danger of the ultimate subordination of the executive to the legislative department excited the gravest apprehensions of that wisest political sage, Mr. Madison, when the Constitution was being framed. Short of the sword, it is the extreme remedy, and was intended for the worst political disorders of the executive department. Nothing but treason, official bribery, or other high crimes or misdemeanors, made so by law, and also in their nature of deep moral turpitude,

which are dangerous to the safety of the State and which palpably disqualify and make unfit an incumbent to remain in the office of President, can justify its application to him. Cases that do not come up to this measure of delinquency, those who made the Constitution intended should be remedied in the frequency of our elections by the people at the ballot-box; and the public repose and welfare require that they should be referred to that most appropriate tribunal.

Impeachment was not intended to be used as an engine to gratify private malice, to avenge disappointed expectations, to forward schemes of personal ambition, to strengthen the measures or continue the power of a party, to punish partisan infidelity, to repress and crush its dissensions, to build up or put down opposing factions. By our system all that sort of work is to be done in popular canvasses; and to bring the great and extraordinary remedy of impeachment to do any of it, is the vile prostitution of what was intended to be a rare and august remedy for great evils of state.

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Opinion of Mr. Senator TRUMBULL.

To do impartial justice to all things appertaining to the present trial, according to the constitution and laws, is the duty imposed on each senator by the position he holds and the oath he has taken, and he who falters in the discharge of that duty, either from personal or party considerations, is unworthy his position and merits the scorn and contempt of all just men.

The question to be decided is not whether Andrew Johnson is a proper person to fill the presidential office, nor whether it is fit that he should remain in it, nor, indeed, whether he has violated the Constitution and laws in other respects than those alleged against him. As well might any other 54 persons take upon themselves by violence to rid the country of Andrew Johnson, because they believe him a bad man, as to call upon 54 senators, in violation of their sworn duty, to convict and depose him for any other causes than those alleged in the articles of impeachment. As well might any citizen take the law into his own hands, and become its executioner, as to ask the senators to convict outside of the case made. To sanction such a principle would be destructive of all law and all liberty worth the name, since liberty unregulated by law is but another name for anarchy.

Unfit for President as the people may regard Andrew Johnson,

and much as they may desire his removal, in a legal and constitutional way, all save the unprincipled and depraved would brand with infamy and contempt the name of any senator who should violate his sworn convictions of duty to accomplish such a result.

Keeping in view the principles by which, as honest men, we are to be guided, let us inquire what the case is.

The first article charges Andrew Johnson, President of the United States, with unlawfully issuing an order, while the Senate was in session, and without its advice and consent, with the intent to remove Edwin M. Stanton from the office of Secretary for the Department of War, contrary to the constitution and the "act regulating the tenure of certain civil offices," passed March 2, 1867. It will be observed that this article does not charge a removal of the Secretary, but only an intent to remove, which is not made an offence by the tenure-of-office act or any other statute. . . .

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The second article charges that the President, in violation of the Constitution, and contrary to the tenure-of-office act, and with intent to violate the same, issued to Lorenzo Thomas a letter of authority empowering him to act as Secretary of War *ad interim*, there being no vacancy in the office of Secretary of War. There is nothing in the tenure-of-office act, or in any other statute, prohibiting the issuing of such a letter, much less making it a crime or misdemeanor. The most that can be said is that it was issued without authority of law.

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What has been said in regard to the second article applies with equal force to the third and eighth articles: there being no proof of any unlawful intent to control the disbursements of the moneys appropriated for the military service, as charged in the eighth article.

Articles four, five, six and seven taken together, charge in substance that the President conspired with Lorenzo Thomas and other persons with intent, by intimidation and threats, to prevent Edwin M. Stanton from holding the office of Secretary of War, and by force to seize the property of the United States in the Department of War; also that he conspired to do the same thing contrary to the tenure-of-office act, without any allegation of force or threats.

The record contains no sufficient proof of the intimidation, threats, or force charged; and as the President had, in my opinion, the right to remove Mr. Stanton, his order for that purpose, as also

that to General Thomas to take possession both peacefully issued, have, in my judgment, none of the elements of a conspiracy about them.

The ninth article, known as the Emory article, is wholly unsupported by evidence.

The tenth article, relating to the speeches of the President is substantially proven, but the speeches, although discreditable to the high office he holds, do not, in my opinion, afford just ground for impeachment.

So much of the eleventh article as relates to the speech of the President made August 18, 1866, is disposed of by what has been said on the tenth article.

The only proof to sustain the allegation of unlawfully attempting to devise means to prevent Edwin M. Stanton from resuming the office of Secretary of War is to be found in a letter from the President to General Grant, dated February 10, 1868, written long after Mr. Stanton had been restored. This letter, referring to a controversy between the President and General Grant in regard to certain communications, oral and written, which had passed between them, shows that it was the President's intent in case the Senate did not concur in Stanton's suspension, to compel him to resort to the courts to regain possession of the War Department, with a view of obtaining a judicial decision on the validity of the tenure-of-office act; but the intention was never carried out, and Stanton took possession by the voluntary surrender of the office by General Grant. Was this intent or purpose of the President to obtain a judicial decision in the only way then practicable a high misdemeanor?

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There is no proof to sustain the other charges of this article. In coming to the conclusion that the President is not guilty of any of the high crimes and misdemeanors with which he stands charged, I have endeavored to be governed by the case made without reference to other acts of his not contained in the record, and without giving the least heed to the clamor of intemperate zealots who demand the conviction of Andrew Johnson as a test of party faith, and seek to identify with and make responsible for his acts those who from convictions of duty feel compelled on the case made to vote for his acquittal. His speeches and the general course of his administration have been as distasteful to me as to any one, and I should consider it the great calamity of the age if the dis-

loyal element, so often encouraged by his measures, should gain political ascendency. If the question was, Is Andrew Johnson a fit person for President? I should answer, *no;* but it is not a party question, nor upon Andrew Johnson's deeds and acts, except so far as they are made to appear in the record, that I am to decide.

Painful as it is to disagree with so many political associates and friends whose conscientious convictions have led them to a different result, I must, nevertheless, in the discharge of the high responsibility under which I act, be governed by what my reason and judgment tell me is the truth and the justice and the law of this case. What law does the record show the President to have violated? Is it the tenure-of-office act? I believe in the constitutionality of that act, and stand ready to punish its violators; but neither the removal of that faithful and efficient officer, Edwin M. Stanton, which I deeply regret, nor the *ad interim* designation of Lorenzo Thomas, were, as has been shown, forbidden by it. Is it the reconstruction acts? Whatever the facts may be, this record does not contain a particle of evidence of their violation. Is it the conspiracy act? No facts are shown to sustain such a charge, and the same may be said of the charge of a violation of the appropriation act of March 2, 1867; and these are all the laws alleged to have been violated. It is, however, charged that Andrew Johnson has violated the Constitution. The fact may be so, but where is the evidence of it to be found in this record? Others may, but I cannot find it. To convict and depose the Chief Magistrate of a great nation, when his guilt was not made palpable by the record, and for insufficient cause, would be fraught with far greater danger to the future of the nation than can arise from leaving Mr. Johnson in office for the remaining months of his term, with powers curtailed and limited as they have been by recent legislation.

Once set the example of impeaching a President for what, when the excitement of the hour shall have subsided, will be regarded as insufficient causes, as several of those now alleged against the President were decided to be by the House of Representatives only a few monthes since, and no future President will be safe who happens to differ with a majority of the House and two-thirds of the Senate on any measure deemed by them important, particularly if of a political character. Blinded by partisan zeal, with such an example before them, they will not scruple to remove out of the way any obstacle to the accomplishment of their pur-

poses, and what then becomes of the checks and balances of the Constitution, so carefully devised and so vital to its perpetuity? They are all gone. In view of the consequences likely to flow from this day's proceedings, should they result in conviction on what my judgment tells me are insufficient charges and proofs, I tremble for the future of my country. I cannot be an instrument to produce such a result! and at the hazard of the ties even of friendship and affection, till calmer times shall do justice to my motives, no alternative is left me but the inflexible discharge of duty.

OPINION OF THE JUSTICES.

Supreme Judicial Court of Massachusetts. February, 1897.

167 Massachusetts 599.

The following order was adopted by the House of Representatives on January 27, 1897, and thereupon transmitted to the Justices of the Supreme Judicial Court, who on February 25, 1897, returned the opinion which is subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required upon the following important question of law, namely:

"Is the county commissioner an officer of the Commonwealth within the meaning of Article VIII of Section 2 of Chapter 1 of the Constitution, and is a county commissioner subject to the impeachment process provided by the Constitution?"

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The undersigned, Justices of the Supreme Judicial Court, respectfully submit the following answer to the question proposed by the Honorable House, by its order of January 27, 1897, a copy of which is annexed.

In the Constitution, c. 1, section 2, art. 8, it is provided as follows: "The Senate shall be a court with full authority to hear and determine all impeachments made by the House of Representatives, against any officer or officers of the Commonwealth, for misconduct and maladministration in their offices." By virtue of this provision, no one can be impeached except officers of the

Commonwealth; and it is necessary to determine whether county commissioners fall within this description.

There are several classes of civil officers within the Commonwealth; for example, town or city officers, county officers, officers of districts, and State officers. In a certain sense, all of these officers may be deemed to be officers of the Commonwealth, and it is possible accordingly to take the view that all are subject to impeachment. But in our opinion this provision of the Constitution was not intended to include all civil officers of every grade within the commonwealth.

On the one hand, it seems to us that the various officers of cities or towns do not fall within the class of officers of the Commonwealth in the sense in which these words are used in this pro-provision of the Constitution.

On the other hand, officers elected by the people at large, or provided for in the Constitution for the administration of matters of general of State concern, are subject to impeachment.

The intention of the framers of the Constitution in respect to such officers as county commissioners is not free from doubt. The office of county commissioner is created by statute, and the Legislature can by statute determine in what manner an incumbent may be removed from office. They have some duties or functions which concern the people of the State at large. But it seems to us that they are essentially a local body. They are elected by the people of a county, and their duties relate chiefly to the affairs and interests of the county. Some of their duties are much like duties performed by selectmen, or by a mayor and alderman, except that their jurisdiction extends over the whole county. In Nantucket, selectmen by law perform the duties of county commissioners. In Suffolk County, these duties are performed in part by municipal officers.

It seems to us that the better construction of the constitutional provision is that county commissioners are not subject to impeachment as officers of the Commonwealth. Considering the nature and character of the proceedings by impeachment, it does not seem wise to extend their scope by a doubtful construction. If mayors and aldermen of cities and selectmen of towns are not impeachable, we can see no clear line of distinction which would make county commissioners impeachable.

We have been unable to find any plain intimation by legislatures, courts, or writers of authority, that county commissioners have ever been thought to be impeachable under provisions like those

of our constitution. The fact that no precedent is known, though not decisive of itself, is entitled to some weight.

For these reasons, thus briefly expressed, although some of us, while yielding to the conviction of our associates, have not been able to free our minds from doubt, our answer to the question of the Honorable House of Representatives is in the negative.

WALBRIDGE A. FIELD.
CHARLES ALLEN.
OLIVER WENDELL HOLMES.
MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATHROP,
JAMES M. BARKER.

February 25, 1897.

STATE EX REL. ADAMS V. HILLYER.

Supreme Court of Kansas. July, 1863.

2 Kansas 17.

Information in Supreme Court in the nature of a *quo warranto* exhibited upon the relation of Daniel M. Adams by the Attorney General of the State, for the purpose of removing Hillyer, respondent, from the office of auditor of the State. The information states that Hillyer since the 16th day of June, A. D. 1862, hath used, exercised and held, and still doth use and exercise the office of Auditor of State of Kansas without lawful warrant or authority therefor: That the said Hillyer was impeached by the House of Representatives on the 14th day of February, A. D. 1862, by articles duly presented to the Senate, and that on the 16th day of June thereafter the Senate, sitting for the trial of said accusation, pronounced a judgment of guilty, and of removal from the said office of Auditor, of the said Hillyer.

The respondent by his plea did not controvert the facts set forth in the information, but asserts that the body that pronounced the judgment had no constitutional existence, and therefore the judgment was a nullity.

Other facts appear in the opinion of the court.

By the Court, KINGMAN, J.

The facts of the case were agreed upon leaving for the Court

to decide the single question, whether the session held by the Senate when it tried and pronounced judgment in the case, was a legal and constitutional one.

This is denied on two grounds.

1st. There is no power in the Senate to set for the purpose of trying impeachments when the House is not in session.

2d. If such power exists, the adjournment of the Senate to the 1st Monday in June was without consent of the House, and void; and if valid, was annulled by the subsequent concurrent resolution adjourning the Legislature, *sine die.*

By constitutional provision all impeachment cases are to be tried by the Senate; but as to when the Senate shall set for that purpose or how the trial shall be conducted the constitution is silent except in declaring that the senators when sitting for that purpose shall be sworn; that the concurrence of two-thirds of the Senators elected is necessary to a conviction, and a limitation as to the extent of punishment.

In the absence of express provisions it is presumed that the common law "will regulate, interpret, and control the powers and duties of the Court of Impeachment," but this rule, applicable only to the trial and proceedings, affords no guide in determining the question as to the organization of the Court, for in this state the tribunal that tries, as well as the body that prefers the accusation, are entirely unknown to the common law, and if there is such a general resemblance of our legislative assembly to the Parliament of Great Britain, as to be easily noticed, the points of dissimilarity are still more apparent and striking. And this, not only in the organization and general powers of the two bodies, but even in this matter of impeachment.

By our law the House of Representatives alone can prefer charges of impeachment, by the common law of Parliament, not only the Commons, but a Peer or the Attorney General at the suit of the King may prefer articles of impeachment. (Com. Dig. V. 238.)

In prosecutions by the Commons upon an impeachment, it belongs to the Commons to demand judgment (Com. Dig. V. 244), and the House of Commons have a right to be present whether they appoint managers or not, that every member may satisfy his conscience whether he will give his vote to demand judgment. (Strafford's Case, 2 Commons Journal, 105-108.)

This right of the Commons to be present in cases where the impeachment was presented by them grows out of the assumed right

of the Commons to arrest the prosecution by refusing to demand judgment, even after the person impeached has been found guilty. Such power has never been exercised or claimed in this country by the House exhibiting the accusation, and would be utterly subversive of the independent jurisdiction of the Senate as a Court of Impeachment, by subjecting the judgments of the senate to the review of the House before they would be of any force or effect.

The reason of the usage or right of attendance upon the trial by the Commons having failed, the rule itself ceases, as we have adopted no more of the common law in this state than is adapted to our situation and applicable to our institutions. The laws of this State, however, by express provision, have empowered the Senate, when sitting as a Court for the trial of impeachments, to hold sessions after the adjournment of the Legislature, and whatever may have been the rule of the common law it was prefectly competent for this legislature to prescribe a different rule unless prohibited by the Constitution, and we look in vain for any such provision, either express or implied. Nor is there in that instrument any inhibition of the session of one branch of the Legislature when the other is not in session. There is a fixed time when both houses shall meet, a limitation of the power of one house to adjourn for a longer period than two days without the consent of the other, and in case of disagreement, the Governor may adjourn them.

If it be admitted, as claimed, that when acting in their legislative capacity, the proceedings of one house, when the other is not in session, have no validity, it can only be upon the ground that their legislative power is a unit, though distributed, and the parts can only act in unison, and neither the reason nor principle would apply to this case. . . . The case before the court presents much stronger reasons why the separate action of one body may be valid in the absence or non-organization of the other, for the Senate acts entirely in a judicial capacity. Its action is independent of the House; and as we have seen, there is no reason why the House should be present or in session, and in the absence of constitutional inhibition we can perceive no reason why the Senate, with the consent of the House, may not adjourn to any period during their term of office, and not beyond the regular meeting of the Legislature, whether the House be in session or not. If at such adjourned session its acts were confined, as in this case, to duties in which they were entirely independent of the House

or any action it might take, those acts would be valid and conclusive.

Another view of this point in the case will illustrate and strengthen the conclusion. Had the Constitution conferred the power of trying impeachments upon any other tribunal than the Senate, and named no time for the trial, and fixed no limits for adjournment, no one would have the hardihood to deny that both these matters might be regulated by law.

In this State the Legislature has given express power to the Senate when organized and sitting as a court for the trial of any impeachment, to adjourn from time to time and hold a session after the adjournment of the Legislature.

Such a law is clearly within the province of the Legislature to enact, but would, of course, be limited by the last clause of Sec. 10, Art. 2, of the Constitution, so that such adjournments can only be made by consent of the House. The law may well be taken as the clearly manifested consent of the House that passed it, that the then Senate might adjourn and hold sessions after the Legislature, but not as to the consent of any subsequent House that such session may be held.

But it is denied that the House ever gave its consent to the adjournment of the Senate until June.

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The constitution prohibits the adjournment of one House for more than two days without the consent of the other, but does not point out how or when that consent shall be given. It would be difficult to conceive of a stronger manner of giving that consent than by previous request, reiterated, as in this case, that it be done. But to avoid all cavil the law above quoted was passed the next day, and was in the most solemn manner and with all the forms of legislation, a declaration of the consent of that House, that the then Senate might adjourn at its pleasure and hold sessions after the adjournment of the Legislature. It is essential to the validity of a contract that each of all the parties to it should give his assent to its terms. Yet few contracts upheld and enforced by the Courts present so strong and varied evidence of the assent of the parties as this case does of the consent of the House to the adjournment of the Senate till the first Monday in June.

But it is insisted that the concurrent resolution adjourning the Legislature *sine die* on the 6th of March, 1862, dissolved both branches of the Legislature finally, and they could not be convened again save by the exercise of executive power. It is evident

that each branch of the Legislature considered this resolution with reference to the previous adjournment of the Senate sitting as a court of impeachment, and the law which had just been enacted; and this is the plain sense and clear legal import of the several acts. The Senate, sitting as a court, having adjourned its sessions as such, to the 1st Monday in June, united with the House in a concurrent resolution to terminate their Legislative sittings by an adjournment *sine die* on the 6th of March. This is all that the language of the resolution would indicate and all that was intended; and the meeting of the Senate as a court in June was not in conflict with it, and it must be so held.

All the justices concurring; EWING, C. J., BAILY and KINGMAN on the bench.

IN RE EXECUTIVE COMMUNICATION.

Supreme Court of Florida. April, 1872.

14 Florida 289.

WESTCOTT, J., delivered the opinion of the court.

Sec. 16, Art. V, of the Constitution of this State provides that the "Governor may at any time require the opinion of the Justices of the Supreme Court as to the interpretation of any portion of this constitution or upon any point of law and the Supreme Court shall render such opinion in writing."

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The question presented for our consideration is whether his Excellency Harrison Reed, Governor of Florida, is at this time in contemplation of law "deemed under arrest" and "disqualified from performing any of the duties of his office." We are obliged to determine this question in order to ascertain whether he has a right to demand our opinion as well as whether it is our duty to give it.

The Constitution (Art. LX, Sec. 16) declares that any officer when impeached by the Assembly shall be in that condition, but any officer so impeached may demand his trial by the Senate within one year from the date of his impeachment. His Excellency Harrison Reed, Governor of Florida, was impeached at the late session of the Legislature (January, 1872). This is admitted by the communication now before us, and it is shown by the journals of

the House of Assembly and the Senate for that session. The consequence of that impeachment was to disqualify him from performing the duties of his office. The suspension consequent upon the impeachment can cease to exist under the Constitution, if it ceases at all, but in one way—which is acquittal by the Senate—for whatever may be the effect of the expiration of one year from the impeachment and demand for trial, that time has not elapsed, and for that reason the construction of that clause of the constitution is not here involved. In the language of the constitution the officer "shall be disqualified from performing any of the duties of his *office until acquitted by the Senate.*" The only event then which could have operated in this case to restore this officer to his powers, must have been *an acquittal by the Senate.* The simple question then presented for our consideration is, has there been *an acquittal by the Senate?*

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The only question, therefore, which remains to be considered to dispose of this very elaborately argued subject is, *has the Senate made any such final disposition of this impeachment?* This is a very plain, simple question, to be determined by an examination of the journal of the proceedings of the court and the Senate on the last day of the session of the Court of Impeachment.

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It appears, therefore, that the court after failing to act upon a motion to acquit and discharge the prisoner, simply adjourned, and that the Senate at 12 M. on the same day adjourned for the session. In view of this record, it is plain, therefore, that the court made no final disposition of the case, but simply adjourned. The case is, therefore, still pending in that court. A case is pending if it is not finally disposed of, and clearly here is no final disposition of it by any order of the Senate so doing. On the contrary, the record shows that a motion to discharge was pending at the time of adjournment.

But it is insisted that this action by the Senate entitled the respondent to his discharge, and that in contemplation of law it was equivalent to his discharge. Now, if the Senate is the sole authority to discharge—if it is the only tribunal that can discharge—then it is plain that it is the only authority that can act in the matter? *Whether a prisoner is discharged from the custody of a court or from an indictment, is a fact to be determined by a simple inspection of the record. If there is no order to that effect, then there is no discharge, and if, as in this case, there is nothing in the*

record discharging the respondent, the simple result is that the Senate has not discharged him.

It is proper to inquire here whether we have any legal right or power to determine what the effect of this action is under the circumstances. If we have not; if it shall be, as we conceive it is, the exclusive and sole province of the Senate to determine that question; if by so doing we usurp a jurisdiction not vested in this court by the State Constitution and wrest a case now pending from a court of exclusive jurisdiction over the trial of the subject, and presume to review its action and discharge what we may conceive to be its duty, it is plain that such action is improper.

Let us compare the powers and functions of the Senate in this matter with the power of this court. What is the Senate when organized for the purpose of trying impeachments? What is the extent of its jurisdiction, and what relation exists between this tribunal and that? The Senate, when thus organized, is unquestionably a court—because it is a body invested with judicial functions; because it determines issues both of law and fact; because it announces the law in form of judgment, and through that instrumentality adjudges the penalties named by the Constitution. Not only is it a court, but it is a court of exclusive original and final jurisdiction. Its judgments can become the subject of reversal or review in no other court known to the Constitution and the laws. This simple exercise of judicial functions, the application of law to facts and announcing its conclusions, are not extraordinary or transcendent powers. Nor is the simple fact that its jurisdiction is both original and final a circumstance which alone would justify us in ascribing to it any extraordinary degree of importance, because the general reason why a court has both original and final jurisdiction is the small degree of importance of the matter involved. Not only is this tribunal a court, but it is a court of great importance. Its jurisdiction is not indeed very extensive as to the number of the subjects-matter which may come under its control, but the sphere in which it acts, while limited to but one class of cases, is most high and transcendant. This is so because of the subject-matter of its jurisdiction, the degree and extent of the punishment it imposes, and the exclusive power which it has of regulating its practice arising upon any matter pending before it. All other persons in whom judicial power is vested under the Constitution derive their existence from a delegated power to the Governor and Governor and Senate. These persons represent the peo-

ple directly through the exercise of the elective franchise. . . . We may oust an usurper because he was not elected or eligible, and there our power ends. This Court of Impeachment and the Assembly go further. To them the people have confided the superintendence and control of all persons who are invested with distinguished political franchises and offices. This court can say to an officer, you are not elected or qualified. That court can say to him, we admit that you are selected by the people; that you were in all respects qualified, and notwithstanding all this, you shall not only no longer discharge the functions and franchises of a particular office, but you shall not hold in the future any office of honor, trust or profit under the State. Under these circumstances, we submit that we should and must be very careful how we act in such matters. This jurisdiction is too high and transcendent to be invaded.

In the argument of this case allusions were made to the rule that the different departments of the government must keep within their several constitutional spheres of action. The conflict here threatened is not between co-ordinate departments of the government. It is between two courts of high and transcendent jurisdiction. We having no jurisdiction of the subject-matter of impeachment, propose to discharge an impeachment proceeding because we conceive that the legal effect of certain action taken in the court having exclusive jurisdiction of the subject is to entitle the party to a discharge. Suppose we test the question of jurisdiction by bringing the matter to a contest. Suppose we say in this instance to Governor Reed that the legal effect of this action is your discharge and you are entitled to enter upon the duties of your office. Suppose the Senate meet to-morrow and determine for themselves that they have not in fact discharged the prosecution and they have done nothing which in law entitles him to a discharge; that upon their calendar the case is still pending and they propose to proceed to the trial. Is it not perfectly clear that if the Senate has the exclusive jurisdiction of the case, its judgment and not ours must prevail? We think there can possibly be no doubt here.

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We cannot determine the effect of this action of the Senate, and all that we have to do with the subject is to respect its judgment, whatever it may be, provided the punishment inflicted is not in excess of that named in the Constitution, and is authorized by

it, and is the judgment of a legal Senate vested with jurisdiction of the subject-matter and of the person.

. . . . . .

Our power in the matter of this impeachment is limited and circumscribed by the fact that it is a matter beyond our jurisdiction entirely. After an impeachment perfected according to the Constitution, the whole matter is with the Senate, and it has the exclusive right of determining all questions which may arise in the case. If its action is unconstitutional, we have the right and power to declare its nullity, and, in a proper case before us, to enforce the right of any party of which it proposed to deprive him.

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In what we have said we do not affirm the entire want of jurisdiction or power in this court in *proper cases* to investigate and enquire into any act of the Senate affecting the rights of parties before it in a case where what they have done comes before us collaterally. That power cannot be thrown off. But when the Constitution vests exclusive jurisdiction over impeachments in the Senate, we are deprived of the power of deciding questions arising in the course of the trial, or while the impeachment is pending, for these necessarily must belong to the court vested with the principal power or jurisdiction, and there is no appellate power in this court to reverse it. When, therefore, in exercising the power and jurisdiction vested in this court, we proceed to inquire into matters brought properly to our attention, the law does not authorize us to substitute our judgment for that of the Senate upon questions before that tribunal, and hence, if it appears that no order finally disposing of the case has been made by it, we are at once arrested by the rule of constitutional law which affirms that the Senate itself is the only tribunal to decide whether, from the nature of its own previous action, the party is entitled to a discharge.

. . . . . .

With these views, we can only say that until Gov. Reed is acquitted by the Senate, we cannot acquit him, and that during his suspension his power as Governor to demand our opinion upon any question of law ceases. We decline to say whether the law applicable to the proceedings of the Senate at its last session entitled him to a discharge. It would be improper in this court to go beyond saying that the Court of Impeachment is still in existence and must determine the matter. We should not suggest to that court how it should determine a question to come before it in a case now pending. With the circumstances reversed, we should

not be very much obliged to that or any other tribunal should it suggest to us how we should determine a case pending before this court; and should it, unasked by us, give its views of the law of a case pending before this court, we should deem it a grave mistake as well as an improper interference. Being suspended, Gov. Reed's relation to us in this matter is no more than that of a citizen, and it would certainly be improper in us to give a voluntary opinion to a citizen upon a question of law, and whether we had jurisdiction over the subject-matter or not.

THE STATE *EX PARTE*, V. O'DRISCOLL.

Constitutional Court of South Carolina. May, 1815.
2 Treadway's South Carolina Reports 713.

BREVARD, J. The motion for the reversal of the order of the district court in this case has been placed on various grounds. I will consider and dispose of the objections to the order of the district court in question, in the course in which they are exhibited in the brief. The first is, that the Senate proceeded unconstitutionally against the appellant by impeachment, and that their judgment of removal from office is illegal and void. . . . But I think it unnecessary to discuss these questions, as I am of opinion that the part of the act of Assembly of 1789 relied on, has been wholly superseded and repealed by the constitution, which declares "that all civil officers shall be liable to impeachment for any misdemeanor in office."

. . . . . .

The only answer which I shall make to the fourth ground is, that it is not for this court to rectify, or condemn the proceedings and judgment of the high court of impeachment; the constitution has given no such power, and moreover I think it disrespectful to that great and independent tribunal, to suffer its proceedings and judgments to be criticised and censured in the manner it was on the argument in this case.

. . . . . .

Justices COLCOCK, SMITH, and GRIMKE, concurred.

The official relation may be terminated also by the abolition of the office. Koch v. The Mayor, 152 N. Y. 72, *supra*, and the legislature may in the absence of a constitutional inhibition declare an office vacant by the passage of a law. See cases cited in Attorney General v. Jochim, 99 Mich. 358, *supra*.

CHAPTER VI.

COMPENSATION OF OFFICERS.

I. Not Based on Contract.*

WHITE V. INHABITANTS OF LEVANT.

Supreme Judicial Court of Maine. January, 1887.

78 Maine 568.

Walton, J. The only question we find it necessary to consider is whether one who has accepted a town office to which neither the legislature nor the town has annexed any compensation, can maintain an action to recover compensation for his official services. It is well settled that he cannot. The compensation of some town officers is provided for by statute. The compensation of assessors, selectmen, and overseers of the poor, is thus provided. R. S. c. 6, sec. 102. Such compensation may of course be recovered, whether the town is willing to pay or not. So, if the town has expressly voted a compensation. But in the absence of any such statute or vote, no compensation can be recovered. *Talbot* v. *East Machias,* 76 Maine 415; *Sikes* v. *Hatfield,* 13 Gray 347; *Walker* v. *Cook,* 129 Mass. 578; Dillon's Mun. Corp. (2d ed.) Sec. 169.

The plaintiff has obtained a verdict on a claim made up largely of charges for his official services as town agent. Unfortunately for him neither the town nor the legislature has annexed any compensation to his office. The verdict, therefore, is contrary to law, and must be set aside.

The motion is sustained, the verdict set aside, and a new trial granted.

Peters, C. J., Danforth, Emery, Foster, and Haskell, JJ., concurred.

*In the absence of a constitutional inhibition the legislature is to fix the compensation of an officer which it may change during the term of an incumbent. Butler v. Pennsylvania, 10 How. U. S. 402, *supra.*

COUNTY OF LANCASTER V. FULTON.

Supreme Court of Pennsylvania. October, 1889.

128 Pa. St. 48.

Opinion by Mr. Justice STERRETT:

In his statement and affidavit of claim, plaintiff below avers that his demand is founded upon a contract between himself and the county commissioners, dated June 28, 1882, by which he agreed to collect from the Commonwealth all overpaid taxes on personal property then due; for which services the county, by its commissioners, agreed to pay him twenty-five per centum on the amount or amounts which might be credited to it in its accounts with the Commonwealth.

. . . . . .

That, "in pursuance of said agreement and resolution the plaintiff, after five years of work, labor, and great expense . . . . procured a credit settlement in favor of the county . . . in its account with the Commonwealth, of $20,823.50; of overpaid taxes included in the terms of said contract," etc.; and the plaintiff's compensation for services, etc., as specified in said agreement and resolution, is $5,205.87, which sum is now due with interest thereon from June 20, 1887.

In substance, the defence interposed by the county was, that at the time the resolution of June 28, 1882, was adopted, plaintiff below "was the duly elected and qualified solicitor" of the county, serving under the act of February 18, 1870, at a salary of $500 fixed by that act; and, for that reason, neither he nor the county commissioners had any power or authority to enter into the contract, under which the services were rendered, and on which the claim is founded.

It is conceded that when the contract was made and for a considerable time thereafter, plaintiff below was the duly elected and qualified solicitor of the county.

. . . . . .

He was undoubtedly a public officer within the meaning of the constitution, article III, Sec. 13, and article XIV, Sec. 1 and 5, the first of which declares: "No law shall extend the term of any public officer or increase or diminish his salary or emoluments, after his election or appointment."

The services for which the contract in question undertakes to

provide, are clearly within the sphere of the duties of the "solicitor of Lancaster county," as defined by the act of February 18, 1870.

. . . . . .

What authority, then, had either the plaintiff below, or the county commissioners, to enter into a contract to compensate the former for services within the sphere of his duties as solicitor of the county? We are of opinion that they had none; that the act of the commissioners in undertaking to bind the county to pay the compensation provided for in the contract was *ultra vires*. Doubtless the very object of the act in creating the office of county solicitor, provided for his election and fixing his salary, etc., was to take the power out of the hands of the county commissioners and place it beyond their reach. But be that as it may, we think the contract was *ultra vires* and void, and that the first and second points for charge submitted by defendant below, should have been affirmed.

. . . . . .

In saying, as he correctly did, that if the services of plaintiff below "had been rendered while he was county solicitor, then there could be no recovery," the learned judge rightly assumed that the contract in question was unauthorized and illegal. All such contracts, whether intended to be so or not, are in effect evasive and subversive of law, contrary to public policy, and therefore void.

. . . . . .

Plaintiff's statement of claim avers, and his own testimony proves most conclusively, that all the services for which he claims to recover compensation were rendered under and in pursuance of the original contract. "I commenced under this contract." "I never rejected the contract, as a matter of course." "I continued in this service, beginning on this contract." "I went on under this contract," and many similar questions in his answers to questions put to him on cross-examination.

There is no pretence that any new agreement was entered into, or the terms of the original in any manner changed after the expiration of his term of office. Neither the subject of a new contract nor the modification of the original ever appears to have been considered by the parties. The services of plaintiff below were no doubt efficient and valuable; but, so far as they were rendered during his term of office, his salary is all the compensation he can claim. As to services rendered after the expiration of his term

of office, under and in pursuance of the original illegal and void contract, he cannot, under the pleadings and evidence in this case recover.

. . . . . .

Judgment reversed.

Mr. Justice MITCHELL dissented.

CONVERSE V. THE UNITED STATES.

Supreme Court of the United States. December, 1858.

21 How. (U. S.) 463.

Mr. Chief Justice TANEY delivered the opinion of the court.

. . . . . .

It is obvious, therefore, that in order to carry into execution the intention of the legislative department of the government, these various laws on the same subject-matter must be taken together and construed in connection with each other. And we should defeat instead of carrying into execution the will of the law-making power, if we selected one or two of these acts, and founded our judgment on the language they contained, without comparing and considering them in association with other laws passed upon the same subject.

. . . . . .

The just and fair inference from these acts of Congress, taken together, is, that no discretion is left to the head of a department to allow an officer who has a fixed compensation any credit beyond his salary, unless the service he has performed is required by existing laws, and the remuneration for them fixed by law. It was undoubtedly within the power of the department to order this collector, and every other collector in the Union, to purchase the articles required for light-house purposes in their respective districts, and to make the necessary disbursements therefor. And for such services he would be entitled to no compensation beyond his salary as collector, if that salary exceeded $2,500.

But the secretary was not bound to intrust this service to the several collectors. He had a right, if he supposed the public interest required it, to have the whole service performed by a single agent; for while the law authorizes him to exact this serv-

ice from the several collectors, it at the same time evidently authorizes him to commit the whole to an agent or agents other than the collectors, by regulating the commission which an agent shall receive, and appropriating money for payment of commissions of two and a half per cent upon the whole amount authorized to be expended in this service. And as the collectors would by law be entitled in some cases to nothing, and in others to the small sum above mentioned, if the service was performed by them in their respective districts, it is very clear, from the commissions allowed, and the appropriation to pay them, that he was at liberty to employ a different agency, and pay the commissions given by the law whenever he supposed the public would be better served by this arrangement.

And the case as assumed in the record, is precisely that case. The Secretary had no right, under the laws upon this subject, to order this or any other collector to perform this duty for all the light-house and collection districts. The law has divided it among them, and the executive department had no right to impose it upon one. But he had a right, as we have said, to employ an agent, instead of the collector or collectors of the several districts; and if he did employ one, the law fixed the compensation, and appropriated the money to pay it. He was not forbidden to employ a revenue officer for this purpose; and, so far as services were performed for other districts, he stood in the same relation to the government as any other agent. The law forbidding compensation, or reducing it to a small amount, did not apply to this service. The agency was entirely foreign to his official duties, and far beyond the limits to which the law confined his official duties and power. And as the department appointed him to perform a duty required by law, for which the compensation was fixed by law, and the money appropriated to pay it, he is entitled to the compensation given by law, if he has performed the duty; for the Secretary has no more discretionary power to withhold what the law gives, than he has to give what the law does not authorize. The agency and services performed in this instance had no more connection with his official duties and position than the purchase of a supply of shoes for the troops in Mexico, in the late war, would have been, in the absence of any other person authorized to make such a purchase. And if such a duty was requested or required of him by the head of the proper department, and performed, nobody would deny his right to compensation, if the law

authorized and required the service to be done, and fixed the compensation for it.

Upon the case, therefore, as the plaintiff in error offered to prove it, we think the court erred in refusing to admit the testimony.

Undoubtedly, Congress have the power to prohibit the Secretary from demanding or receiving of a public officer any service in any other office or capacity, and to prohibit the same person from accepting or executing the duties of any agency for the government, of any description, while he is in office, and to deny compensation altogether, if the officer chooses to perform the services; or they may require an officer holding an office with a certain salary, however small, to perform any duty directed by the head of the department, however onerous or hazardous, without additional compensation. But the legislative department of the government have never acted upon such principles, nor is there any law which looks to such a policy, or to such unlimited power in the head of an executive department over its subordinate officers.

No explanation is given of the principle upon which the four hundred dollars additional compensation was allowed. If the services were regarded as extra and additional, and within the prohibition of the law, then he was not entitled to this additional allowance, because his salary exceeded twenty-five hundred dollars and nothing more than the salary fixed ought to have been allowed him. But if they were not within the prohibition, but for services in a different agency, then he was entitled, not merely to four hundred dollars, but to the commission fixed by law. This sum could not have been allowed for supplies in his own district, excluding those for other districts, because, as regards his own district, there is an express prohibition as above stated. We, however, express no opinion upon that particular item, and whether it is a proper allowance or not, must be determined by the circuit court, when it hears the evidence at the trial.

For the reasons above stated, the judgment of the Circuit Court must be reversed.

Mr. Justice CATRON, Mr. Justice GRIER, and Mr. Justice CAMPBELL dissented.

The doctrine of the principal case is also applied where there is no provision of law as to extra compensation. Thus where the mayor of a city is employed to defend a suit against the city he may recover for his services. Niles v. Muzzy, 33 Mich. 61.

UNITED STATES V. SAUNDERS.

Supreme Court of the United States. January, 1887.

120 U. S. 126.

Mr. Justice MILLER delivered the opinion of the court.

Saunders, appellee in this case recovered against the United States in the Court of Claims a judgment for $1,627.00, from which the United States appealed. The recovery was for the salary of the claimant as clerk of the Committee on Commerce of the House of Representatives, from the 14th day of March, 1885, to the 7th day of January, 1886, at the rate of $2,000.00 per annum.

Mr. Saunders held this place from the 1st day of July, 1884, when he was appointed, up to the 7th day of January, 1886, when his successor was appointed. He was paid the compensation up to the 14th of March, 1885, and for the time between that and the 7th day of January, 1886, the Comptroller refused to pay him. The various appropriation acts, including the one which would cover the period now in question, had all made appropriations for compensation for the clerk of the Committee on Commerce. The ground upon which payment is resisted by the United States is, that the claimant was, on the 14th day of March, 1885, appointed a clerk in the office of the President of the United States, since which time he has continued to perform the duties of that office and receive its salary. The Comptroller, in his decision refusing to allow the claim, places his objection upon section 1765 Rev. Stat., and upon the opinion of Attorney General Black, in regard to extra pay and double compensation, delivered in 1857. 9 Opinions Att'y Gen. 123. Section 1765 is found in immediate connection with several other sections on the same subject, of which the two immediately preceding may be considered to some extent *in pari materia.*

. . . . . .

The general question here raised has been much discussed in the opinions of the Attorneys General, and in the decisions of this court. This section 1765, mainly relied upon by the government, is taken from two statutes, the first passed March 3, 1839, 5 Stat. 339, 349, and the second, August 23, 1842, 5 Stat. 508, 510. This opinion of Attorney General Black seems to be in conflict with the principles laid down by his predecessors, and is materially

modified if not overruled, on the point mainly in question here, by his opinion in the case of J. P. Brown, on page 507 of the same volume. In *Hiero's Case*, 5 Opinions Attys. Gen. 765, Attorney General Crittenden held that these two acts of 1839 and 1842 "were intended to fence against arbitrary extra allowances in each particular case, but do not apply to distinct employments, with salaries or compensation affixed to each by law or by regulation."

The case before us comes within the terms of this language, which is further confirmed by the fact that he regarded the act of 1850 as prohibiting a person "from receiving the salary of an office which he does not hold, and not against his receiving the salaries of two offices which he does legitimately hold;" and we do not see that there is any distinction between emoluments received for two distinct employments, whether offices or not, the salaries of which are distinct, and the services rendered distinct, both appointments being held by the same person, as in this case. We are of opinion that, taking these sections all together, the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of Congress or by order of the head of his Department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is in the eye of the law two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations. In the former case he performs the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation. The case of *United States* v. *Brindle*, 110 U. S. 688, in which an Indian agent received large additional compensation for services connected with the sale of lands belonging to the Indians of his agency, which was affirmed in this court, was upon the ground that these additional services were performed for the benefit of the Indians, and the

statute implied the payment of a reasonable compensation for such services. See also *Converse* v. *United States*, 21 How. 463.

These views require the affirmance of the judgment of the Court of Claims; and it is ordered.

Affirmed.

UNITED STATES V. FLANDERS & OTHERS.

Supreme Court of the United States. October, 1884.

112 United States Reports 88.

Mr. Justice BLATCHFORD delivered the opinion of the court.

This is a suit brought by the United States in the Circuit Court of the United States for the Eastern District of Louisiana, against George S. Denison and the sureties on his bond, as collector of internal revenue for the first collection district of Louisiana, to recover $4,346.84, as public money which he collected and did not pay over. Three of the sureties defended the suit, and, on a trial before a jury, there was a verdict in their favor, and a judgment accordingly. The United States have sued out a writ of error.

The answer sets up that Denison, or his estate, is entitled to further credits than those delivered to him, which claims for credits he presented to the accounting officers of the Treasury, but they disallowed them, to the amount of $4,199.74, on account of his compensation as collector, and to the amount of $777, on account of money paid by him for necessary and legal advertising.

. . . . . .

The counsel for the plaintiffs requested the court to instruct the jury, that, during the time Denison was collector, the law did not provide for the reimbursement to collectors of internal revenue of any amount expended by them for advertisements; and that, there being no proof that the Secretary of the Treasury had ever made any allowance to Denison for amounts expended by him for advertisements, nothing could be allowed to the defendants for advertising. The court refused to give that instruction, but gave the following: that "if, in accordance with the terms of the statute, defendant Denison was required as collector of internal revenue, to make, and did make, in certain newspapers, certain advertisements, for which he was required to pay, and did pay,

and if, also, the jury found that the amounts so paid were reasonable and proper amounts, he was entitled to a credit for the amounts so paid by him, although the Secretary of the Treasury had made no allowance to him therefor." To this refusal and instruction the plaintiffs excepted.

. . . . . .

The instruction given is not open to the criticism made, that it submitted to the jury a question of law. It was not left to the jury to determine whether the advertising for which credit was claimed was such as the collector was required to make, in the sense that it was left to the jury to determine what advertisements the law required to be made. But it must be inferred, that the court explained the statute as to the advertisements, and the fair meaning of the instruction is, that it was left to the jury to say whether, in view of the advertisements which the statute, as explained by the court, required, those made by the collector were such advertisements, and were made and were paid for, and were reasonable and proper in amount.

In *Andrews* v. *United States,* 2 Story, 202, which was a suit on the bond of a collector of customs, Mr. Justice Story held, that expenditures, by a collector of customs, for office rent, fuel, clerk hire, and stationery were properly to be deemed incident to the office, and ought, therefore, to be allowed as proper charges against the United States, and as a set-off in the suit. In that case, the statute required the collector to keep and transmit accounts of those particular expenditures. The Treasury Department disallowed them, but the court held, that the statute contemplated their allowance, and that the collector had a right to be reimbursed their amount, even though he did not keep or transmit the accounts of them. The view taken was, that, if a claim, though not strictly of a legal nature, was *ex aequo ex bono* due to the defendant, for moneys expended on account of, and for the benefit of the United States, he was entitled to an allowance and compensation therefor, upon the footing a *quantum meruit,* under section 3 of the Act of March 3, 1797, 1 Stat. 514. That statute is now embodied in § 957 of the Revised Statutes, which provides that, in all suits against a person accountable for public moneys, he may show that he is equitably entitled to credits which have been rejected. In *United States* v. *Wilkins,* 6 Wheat. 135, 144, this court said, of § 3 of the act of 1797, that it supposed that "not merely legal but equitable credits ought to be allowed to debtors of the United States, by the proper officers of the Treasury;" that all such cred-

its could be allowed at the trial of the suit; and that a judgment was required for such sum only as the defendant, in equity and justice, should be proved to owe to the United States. This view was affirmed in *Gratiot* v. *United States,* 15 Pet. 336, 370, and in *Watkins* v. *United States,* 9 Wall. 759, 765.

In the present case, the statute required the advertisements to be made, and there is nothing in it which implies that they are to be paid for out of the compensation to be allowed, or that they are to be reimbursed because they are not named with stationery and blank books, or because "advertising" was first inserted in the act of 1865. In section 115 of the same act of July 1, 1862, 12 Stat. 488, it was provided, that the pay of collectors should be paid out of the accruing internal duties or taxes, before they were paid into the Treasury, and $500,000 was appropriated "for the purpose of paying" various specified expenses, including "advertising and any other expenses of carrying this act into effect." This advertising was an expense of carrying the act into effect, and was aside from the pay of the collector, and was to be paid out of the Treasury, as an expense. The allowance of it by the accounting officers or otherwise was not a prerequisite to the right of Denison to have it credited to him in this suit. *Campbell* v. *United States,* 107 U. S. 407.

The judgment of the Circuit Court is affirmed.

The same rule is applied where the expenses have been incurred at the instance and for the benefit of a third person. Maitland v. Martin, 86 Pa. St. 120.

II. Relation to Work Done.

LOCKE V. THE CITY OF CENTRAL.

Supreme Court of Colorado. April, 1878.

4 Colorado, 65.

Judgment of nonsuit was entered against the plaintiff in the court below.

Thatcher, C. J. In April, 1874, Bradford H. Locke was duly elected by the council of the city of Central, as city surveyor for the then ensuing municipal year. His general duties were prescribed by ordinance; which also provided that he should "per-

form such other duties as might be enjoined upon him by ordinance or resolution of the city council." The same ordinance prescribed the compensation he should receive for surveying, subdivding or giving the grade of any lot or piece of ground within the city, and furnishing a certificate thereof—which compensation was to be paid by the parties at whose request such work was done. The ordinance is silent as to fees to be paid the city surveyor for all other services. It was admitted at the trial that he had received full compensation for such work as the ordinance prescribed fees. The suit was instituted to recover for the performance of various duties, imposed upon him by ordinance or resolution, for which no fees were fixed. The plaintiff proceeded upon the notion that upon an implied assumpsit he was entitled to recover from the municipal corporation whatever his services were reasonably worth for the discharge of all duties for which the ordinance allowed no compensation.

It is competent for the city council to increase or diminish the fees pertaining to the office of city surveyor, or abolish them altogether. Its incumbent, if the fees be diminished or entirely taken away, may at once resign. As the relation between himself and the city does not rest upon contract, he is not legally bound to continue his services until the expiration of his term. But having accepted the office, as long as he performs its duties, the measure of his compensation must be determined by the city authorities.

Where the relation of employer and employee exists both parties are bound by the terms of the contract. If either party violates his agreement with the other, he may sue for breach of contract. If the employer discharge the employee before the expiration of his term of service, he can be made to respond in damages. But between a municipal corporation and its officers, a very different relation exists. If an officer neglects to perform his duties, the municipality has no remedy against him for breach of contract. At his pleasure he may relinquish his office. His remuneration for services to be rendered may, in the absence of any charter restriction, be changed from time to time at the will of the city council. In the *City of Hoboken* v. *Gear*, 3 Dutcher, 278, the court says: "An appointment to a public office, therefore, either by the government or by a municipal corporation, under a law fixing the compensation and the term of its continuance, is neither a contract between the public and the officer that the service shall continue during the designated term, nor that the salary shall not be changed during the term of office. It is, at most,

a contract that while the party continues to perform the duties of the office *he shall receive the compensation which may from time to time be provided by law.*" See, also, *Baker* v. *The City of Utica,* 19 N. Y. 326; *Smith* v. *The Mayor of New York,* 37 id. 520; *The Commonwealth* v. *Bacon,* 6 Serg. & Rawle, 322.

As the city surveyor entered upon the performance of the duties incident to his office with reference to the provisions of the city charter and ordinances, no assumpsit is *implied* on the part of the corporation in respect to his services. 1 Dill. on Mun. Corp. § 169, and cases cited.

That during the year the plaintiff in error served the city of Central the duties of the city surveyor were more onerous than usual, by reason of the great fire that had destroyed a large portion of the city, cannot be held to affect or modify the rule here laid down. A departure from it cannot but be fraught with mischief to the public service. Whether the dictate of common honesty, under the peculiar state of facts presented by the record in this cause, should have prompted the city council to make the city surveyor additional allowance for his services, it is not our province to determine.

It will follow from what we have before said in relation to implied assumpsit, that the offer to prove that the city council had paid its former "surveyors on bills presented from time to time *irrespective of said ordinance*" was properly rejected.

The judgment of the court below is affirmed with costs.

Affirmed.

FITZSIMMONS V. CITY OF BROOKLYN.

Court of Appeals of New York. June, 1886.

102 N. Y. 536.

FINCH, J. This case presents the question whether an officer entitled by law to a fixed annual salary, but prevented for a time by no default of his own from performing the duties of his office, and earning during that time the wages of another and different employment, must deduct them from his recovery when he sues for his unpaid salary.

The plaintiff was a policeman of the city of Brooklyn, duly appointed to that office and having entered upon the performance of its duties. He was attempted to be removed from office by the police commissioners, but upon a *certiorari* the order of removal was reversed and the plaintiff restored to his office. Between the order of removal and that of restoration he rendered no service as policeman, because not permitted so to do, but during the interval resumed for a time his old occupation as a machinist, and that failing, engaged in work at Schutzen park, the character of which is not disclosed; and from these two sources earned during the period of his removal the sum of $500. The defendant conceded that plaintiff was entitled to recover the unpaid salary of his office, but insisted that his earnings of $500 should be applied upon and deducted from it. The court refused the deduction, the General Term affirmed the judgment, and the defendant brought this appeal.

The rule sought to be applied by the city to the claim of the plaintiff finds its usual and ordinary operation in cases of master and servant and landlord and tenant; relations not at all analogous to those existing between the officer and the state or municipality. The rule in those cases is founded upon the fact that the action is brought for a breach of contract and aims to recover damages for that breach, or compensation for the servant's loss actually sustained by the default of the master. That loss he is required to make as small as he reasonably can. His discharge without just cause is not a license for voluntary idleness at the expense of the master. If he can obtain other employment he is bound to do so, and, if he engages in other service, what he thus earns reduces his loss flowing from the broken contract. But this rule of damages has no application to the case of an officer suing for his salary, and for the obvious reason that there is no broken contract or damages for its breach where there is no contract. We have often held that there is no contract between the officer and state or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office; and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown. We think, therefore, it has no application to the case at bar, and the courts below were

right in refusing to diminish the recovery by applying the wages earned.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur.

But one who is rightfully suspended has no claim for salary even if reinstated. Embry v. United States, 100 U. S. 680.

O'LEARY V. BOARD OF EDUCATION.

Court of Appeals of New York. June, 1883.

93 N. Y. 1.

MILLER, J. The plaintiff claims to recover for his salary as a clerk in the employment of the board of education, from the first of May, 1871, to the 26th of September, 1871, when the finance committee by a resolution, directed that he be removed, and that his removal take effect from the 1st of May, previous. The plaintiff was appointed to his position in 1869 and rendered services until November, 1870, when he made application, stating that he was about to have an operation for cataract performed, and asking for leave of absence until his sight should be restored. . . . . Upon the letter asking for leave, and filed with the board of education, was an endorsement, signed with the initials of the chairman of the finance committee, to the effect that it was granted with inquiries to be made from time to time by the clerk of the board. It would thus seem that the board of education had cognizance of the application and through its financial officer signified its assent to the same. The plaintiff had an operation performed, and reported at the office of the board in February, 1871, but being still unable to perform any duty, on account of his eyes, he was obliged to have another operation performed in the month of March. He again reported in May, 1871, and stated to the president of the board and one of the officers that he was advised to go to Ireland for the benefit of his health. He presented to them the doctor's certificate and they told him he could go. Upon the facts stated there would seem to be no question but that the plaintiff acted under a belief that he had a leave of absence which authorized him to go to Europe on account of the difficulty under which he

labored, and it would seem that the officers of the defendant, with whom he had communication on the subject, must have supposed that such was his intention. It is true the leave of absence was somewhat indefinite, no time being fixed by which it was limited to any particular period; but the leave of absence which was granted could have been withdrawn at any time by the defendant, or, in the discretion of the board, brought to an end by a notice to plaintiff that his services were no longer required, or a resolution discharging him from his position would have relieved the defendant from the effect of the permission granted to him and exonerated it from all liability. This was not done until September following, as already stated, when he was informed that his services were no longer required. That the defendant considered the plaintiff in its employment until he was thus discharged is indicated very clearly by its action in regard to the payment of his salary. The pay-rolls for the months of May and June show that the plaintiff's salary for these months was audited by the auditing committee of the board. The defendant thus recognized that the plaintiff was still in its employment and entitled to pay as one of its employes. This was an approval and a ratification of the leave which had been previously granted, and even if such leave originally, of itself, was insufficient, the subsequent action in allowing plaintiff the amount of his salary he claimed to be entitled to, evinces that the defendant assented to his absence and considered him still in its employment. The plaintiff was clearly entitled to the amount of salary which had been audited to him for the months of May and June, nor are we able to see any reason why he should not be entitled to his salary subsequent to that period and up to the time when the resolution of removal was adopted. He left for Europe on the 15th of May, and at that time no action had been taken by the defendant. He was clearly entitled to his salary up to that date, and the auditing of the bills continued it up to the 1st of July. After that and until the early part of September the public schools were closed, as was also the office of the department and the general office, and all the employes went on their vacation. There was then no service for the plaintiff to perform during this period, and he had the leisure which was allotted to all in the department and to which he was clearly entitled with them.

The defendant having excused the plaintiff for good cause and sufficient reasons from a temporary discharge of his duty, and failing to take any action indicating its intention to relieve him from his office, we think must be regarded as assenting to his ab-

sence and it is estopped from insisting or claiming that the plaintiff was not in its employment. If it was considered that his duties were at an end, some steps should have been taken and he notified that such was the intention of the board.

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When the salary of a public officer is fixed, such officer is entitled to his salary and it cannot be taken away except for good and sufficient cause. While sickness in some cases may furnish sufficient reason for the removal of such officer, yet where the evidence shows that his absence on account of the same has been permitted, no valid reason exists why he should not be entitled to compensation until some action is taken on the subject. *People ex rel. Ryan* v. *French,* 14 W'kly Dig. 173. The resolution of the auditing committee, so far as it purposed to affect and date back the plaintiff's removal to the first day of May, could have no force. It could not impair the leave of absence which had previously been granted and which was subsequently ratified by the action of the board. The rights of the plaintiff which had accrued prior to the resolution, could not be affected thereby, it was retrospective in its character and operation and without any validity whatever.

We think that the finding of the referee, that the plaintiff was not in the employment of the defendant, was erroneous and cannot be upheld. The claim of the respondent's counsel that the resolution of the finance committee was not sufficient to relieve plaintiff from service cannot be sustained. There is nothing to show a want of authority in such committee, and the presumption is that it was authorized, in view of all the facts, to grant him leave of absence. The subsequent action in auditing the plaintiff's salary and the failure of the board to take any action discharging him, until the resolution of the finance committee in September, to which reference has been had, evinces that the leave of absence was granted by the proper authority. There is no ground for claiming that the allowance of the plaintiff's claim was in the nature of a pension or a gratuity and without the sanction of law. A discretionary power must exist in a board of public officers to determine when and to what extent persons in their employment should be excused by reason of sickness or temporary disability, and unless it is clear that such discretion has been abused it should not be overruled and disregarded. In the case of *People ex rel. Burnet* v. *Jackson,* 85 N. Y. 541, the board allowed payment to the estate of a deceased teacher, and the question involved was entirely of a different character from the one here presented. The principle

there involved has no application to the case at bar, where the officer was recognized as being in the employment of the board. The case now presented does not involve the question as to the power to grant gratuities as additional compensation for services rendered which are not authorized by law.

We think the defendant was clearly liable for the payment of the plaintiff's claim, and the judgment should be reversed, a new trial granted, costs to abide the event.

All concur, except ANDREWS and EARL, JJ., dissenting.

Judgment reversed.

See also Dolan v. Mayor, 68 N. Y. 274 and Nichols v. MacLean, 101 N. Y. 526, *supra.*

III. CHANGE OF COMPENSATION.

KEHN V. STATE OF NEW YORK.

Court of Appeals of New York. October, 1883.

93 N. Y. 291.

RAPALLO, J. The uncontroverted evidence shows that on the 1st of May, 1880, the appellant was employed by Mr. Hyde, superintendent of the old capitol, as fireman therein, and continued to serve in that capacity from the time of his employment until the filing of his claim before the board of audit, which was in November or December, 1881.

He claims pay at the rate of $3 per day during that period by virtue of a provision in the general appropriation acts of 1875, which reads as follows: "And the compensation of the men employed as firemen in the capitol is hereby fixed at $3 per day to each of them. Such salaries shall be paid upon the certificate of the keeper of the capitol."

The appellant was paid at the rate thus prescribed by law from the time of his employment up to the 24th of May, 1880, when the superintendent claiming to act under the direction of the comptroller, refused to allow him more than $1.50 per day during the summer months, and he made this reduction for the periods from May 24, 1880, to September 30, 1880, from May 21, 1881, to June 30, 1881. The appellant received the reduced pay during these periods, but there is no evidence that he ever agreed to the re-

duction. From June 30, 1881, to September 30, 1881, he declined to receive the reduced pay, and has been paid nothing. The present claim is for the sums necessary to make up his full pay of $3 per day up to September 30, 1881.

The board of audit rejected the claim, and on appeal to the Supreme Court, the General Term sustained the decision on two grounds. First, that the appellant was hired and agreed to work for $1.50 per day, and was not employed as fireman. Second, that, if otherwise, the rate fixed by statute as fireman's pay might be modified and reduced by the agreement of the parties.

The first ground is, we think, wholly untenable under the evidence.

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As to the second ground upon which the General Term place their decision, we think it comes within the decision of this court in *People ex rel. Satterlee* v. *Board of Police*, 75 N. Y. 38, where it was held that the board of police commissioners could not reduce the amount fixed by law as the salary of a police surgeon and procure persons to act at a less sum than the statute prescribed. To the same effect is *Goldborough* v. *U. S.*, Taney's C. C. Decisions 80, In that case it was further held that it was immaterial whether the person whose salary is fixed by law is or is not an officer, so long as he is specified in the law fixing his salary.

The present case however is stronger than either of those cited. At the time appellant entered into the service his pay was fixed by law and there is no evidence that he ever consented to a change. It was reduced by the superintendent and for a portion of the time the appellant took the reduced pay but that does not estop him from claiming his full pay if he was legally entitled to it. *Montague's Adm'r* v. *Massey*, 13 Reporter 701.

. . . . . .

We think the appellant was entitled to a salary of $3 per day so long as he was retained as fireman and that his claim should have been allowed.

The judgments of the General Term and of the board of audit should, therefore, be reversed and judgment rendered in favor of the appellant for the amount of his claim, with costs.

All concur, except EARL, J., not voting.

Judgment accordingly.

The same rule is applied in case the compensation consists of fees. Hewitt v. White, 78 Mich. 117.

UNITED STATES V. LANGSTON.

Supreme Court of the United States. May, 1886.

118 U. S. 389.

This was a petition in the Court of Claims to recover an unpaid balance of salary claimed to be due defendant in error as minister resident at Hayti. The defence was that Congress, by appropriating a lesser sum, had indicated its purpose to reduce the salary. The case is stated in the opinion of the court. Judgment below in favor of the plaintiff from which the defendant appealed.

Mr. Justice HARLAN delivered the opinion of the court.

From September 28, 1877, until July 24, 1885, the claimant, John M. Langston, held the office of Minister Resident and Consul General of the United States at the Republic of Hayti. At the time he entered upon the discharge of his duties it was provided by statute as follows: "There shall be a diplomatic representative of the United States to each of the Republics of Hayti and Liberia, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be accredited as Minister Resident and Consul General. The representative at Hayti shall be entitled to a salary of $7,500 a year, and the representative at Liberia to a salary not exceeding $4,000 a year." Rev. Stat. § 1683. The sum of $7,500 was annually appropriated for the salary of the minister to Hayti, from the creation of the office until the year 1883.

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In the Diplomatic and Consular Appropriation Act of July 1, 1882, certain sums were appropriated "for the service of the fiscal year ending June 30, 1883, out of any money in the treasury, not otherwise appropriated, for the object therein expressed," one of them being "for ministers resident and consuls general to Liberia, Hayti, Switzerland, Denmark, and Portugal, at $5,000 each, $25,000." 22 Stat. 128. The same act provided that "hereafter the Secretary of State shall, in the estimate of the annual expenditures of diplomatic and consular service, estimate for the entire amount required for its support, including all commercial agents, and other officers, whether paid by fees or otherwise, specifying the compensation to be allowed or deemed advisable in each individual case." 22 Stat. 133. It is stated in the brief of the Attorney General that the Secretary of State made a specific estimate for the salary of the minister resident and consul general to Hayti for the fiscal year

commencing July 1, 1883 and 1884, and that that estimate was $5000 in each report. For each of the fiscal years ending June 30, 1884, and June 30, 1885, the appropriation for the minister resident and consul general at Hayti was $5000, and in the same language as that employed in reference to that officer in the act for the fiscal year ending June 30, 1883.

. . . . . .

The claimant was paid at the rate of $7500 a year up to and including June 30, 1882, and for the balance of his term at the rate only of $5000 a year. He brought this suit to recover the difference between those amounts for the period from June 30, 1882, to July 24, 1885. His claim was sustained in the court below, and judgment was rendered in his behalf for $7666.66.

This case is distinguishable from *United States* v. *Fisher*, 109 U. S. 143, 146, and *United States* v. *Mitchell*, 109 U. S. 146, 149. In Fisher's case it was held that the clause in the Revised Statutes, fixing the salary of the Chief Justice and associate justice of Wyoming at $3,000 per annum, was suspended by the provision in each of the appropriation acts, for the legislative, executive, and judicial expenses of the government for the fiscal year ending June 30, 1879 and 1880, which declared that the sum therein specified—among which was $2,600 each to the governor, chief justice, and two associate justices of Wyoming—were appropriated "in full compensation" for the service of those years. The claim of Fisher for compensation, on the basis fixed by the Revised Statutes, was consequently rejected. This court said: "We cannot adopt the view of the appellee, unless we eliminate from the statutes the words 'in full compensation,' which Congress, abandoning the long used form of the appropriation acts, has *ex industria* inserted. Our duty is to give them effect. When Congress has said that the sum appropriated shall be in full compensation of the services of the appellee, we cannot say that it shall not be in full compensation, and allow him a greater sum."

In Mitchell's case, the claim was for compensation as an Indian interpreter under §§ 2070 and 2076 of the Revised Statutes, the first one of which declared that interpreters of a certain class shall be paid $400 a year each, and by the second one of which it was provided that the several compensations prescribed "shall be in full of all emoluments and allowances whatsoever." During the period for which Mitchell claimed compensation at that rate, he received pay at the rate of $300 per annum, under acts appropriating various sums for interpreters, including seven interpreters for

the Indian tribes among whom Mitchell was assigned to duty, "at $300 per annum, $2,100." 19 Stat. 271. In those acts there was also a clause to this effect: "For additional pay of said interpreters, to be distributed in the discretion of the Secretary of the Interior, $6,000." It was held that these acts manifested a change of policy upon the part of Congress, "namely, that instead of establishing a salary for interpreters at a fixed amount, and cutting off all other emoluments and allowances, Congress intended to reduce the salaries, and place a fund at the disposal of the Secretary of the Interior from which, at his discretion, additional allowances and emoluments might be given to the interpreters." The appropriation by those acts for a fixed sum as compensation for certain interpreters during a prescribed period, followed by the appropriation of a round sum as *additional* pay, to be distributed among them in the discretion of one of the Executive Departments, evinced the intention of Congress not to allow further compensation to such appointees during the periods specified.

The case before us does not come within the principle that controlled the determination of the other cases. The salary of the minister to Hayti was originally fixed at the sum of $7,500. Neither of the acts appropriating $5,000 for his benefit, during the years in question, contains any language to the effect that such sum shall be "in full compensation" for those years; nor was there in either of them an appropriation of money "for additional pay," from which it might be inferred that Congress intended to repeal the act fixing his annual salary at $7,500. Repeals by implication are not favored. It cannot be said that there is a positive repugnancy between the old and the new statutes in question. If by any reasonable construction they can be made to stand together, our duty is to give effect to the provisions of each. *Chew Heong* v. *United States*, 112 U. S. 536, 549; *State* v. *Stoll*, 17 Wall. 425, 430; *Ex parte Yerger*, 8 Wall. 85, 105; *Ex parte Crow Dog*, 109 U. S. 556, 570. The suggestion of most weight in support of the view that Congress intended to reduce the salary of the diplomatic representative at Hayti, is in the improbability, that that body would neglect, in any year, to appropriate the full sum to which that officer was entitled under the law as it then existed. On the other hand, it is not probable that Congress, knowing, as we must presume it did, that that officer had, in virtue of a statute—whose object was to fix his salary—received annually a salary of $7,500 from the date of the creation of his office, and after expressly declaring in the act of 1878, 20 Stat. 91, 98, that he should receive that salary from and after

July 1, 1878, and again, in 1879, that he should receive the same amount from and after July 1, 1879, should at a subsequent date, make a permanent reduction of his salary without indicating its purpose to do so, either by express words or repeal, or by such provisions as would compel the courts to say that harmony between the old and new statute was impossible. While the case is not free from difficulty, the court is of opinion that, according to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law.

The judgment is affirmed.

FISK V. JEFFERSON POLICE JURY.

Supreme Court of the United States. December, 1885.

116 U. S. 131.

Mr. Justice MILLER delivered the opinion of the court. . .

Josiah Fisk, who was an attorney-at-law brought three suits in the proper court of the Parish of Jefferson to recover the salary and fees due him from the parish as district attorney, and he obtained judgments in each case against the Police Jury, which is the governing body of the parish.

Being unable to obtain the payment of these judgments in any other mode, he first made application for a writ of *mandamus* to compel the assessment and collection of a tax for the payment of two of these judgments, and afterwards for another writ in regard to the third judgment; the two judgments being for his salary and fees under one appointment, and the other under a second appointment.

The inferior court granted the writ in one case and denied it in the other. But, on appeal to the Supreme Court of the State, the writs were denied in both cases.

The ground of the jurisdiction of this court to review these judgments is the assertion by plaintiff in error that they were founded

on a law of the state which impaired the obligation of his contract, to wit, the contract on which he procured the judgments already mentioned.

The services for which the judgments were recovered were rendered in the year 1871, 1872, 1873 and 1874. During this period there was in force the act of the legislature of 1871, of which Sec. 7 is as follows:

"That no city or other municipal corporation shall levy a tax for any purpose which shall exceed two per centum on the assessed cash value of all the property therein listed for taxation, nor shall the police jury of any parish levy a tax for any parish purpose during any year which shall exceed one hundred per centum of the state tax for that year, unless such tax shall be first sanctioned by a vote of the majority of the voters." Acts of 1871, p. 109.

But by the constitution of the state of 1880 it was declared that no parish or municipal tax, for all purposes whatsoever, shall exceed ten mills on the dollar of valuation. The Police Jury showed that they had exhausted their power when the application for mandamus was made, by levying the full amount of taxes permissible under this constitutional provision, and the Supreme Court held that they could not be compelled to levy more.

In answer to the argument that, as applied to plantiff's case, the constitutional provision impaired the obligation of his contract, the Supreme Court held that his employment as attorney for the parish did not constitute a contract, either in reference to his regular salary, or to his compensation by fees. And this question is the only one discussed in the opinion, and on that ground the decision rested.

It seems to us that the Supreme Court confounded two very different things in their discussion of this question.

We do not assert the proposition that a person elected to an office for a definite term has any such contract with the government or with the appointing body as to prevent the legislature or other proper authority from abolishing the office or diminishing its duration or removing him from office. So, though when appointed the law has provided a fixed compensation for his services, there is no contract which forbids the legislature or other proper authority to change the rate of compensation for salary or services after the change is made, though this may include a part of the term of the office then unexpired. *Butler* v. *Pennsylvania*, 10 How. 402.

But, after the services have been rendered, under a law, resolu-

tion or ordinance, which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect and rests on the remedies which the law then gives for its enforcement. The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts, to specific agreements, and rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the state than that arising on a promissory note.

The case of Fisk was of this character. His appointment as district attorney was lawful and was a request made to him by the proper authority to render the services demanded of that office. He did render these services for the parish, and the obligation of the police jury to pay for them was complete. Not only were the services requested and rendered, and the obligation to pay for them perfect, but the measure of compensation was also fixed by the previous order of the police jury. There was here wanting no element of a contract. The judgment in the court for the recovery of this compensation concluded all these questions. *Hall* v. *Wisconsin*, 103 U. S. 5, 10; *Newton* v. *Commissioners*, 100 U. S. 548, 559.

The provision of the constitution restricting the limit of taxation, so far as it was in conflict with the act of 1871, and as applied to the contract of plaintiff, impaired its obligation by destroying the remedy *pro tanto*.

It is apparent that, if the officers whose duty it is to assess the taxes of this parish, were to perform that duty as it is governed by the law of 1871, the plaintiff would get his money. If not by a first year's levy, then by the next. But the constitutional provision has repealed that law, and stands in the way of enforcing the obligation of plaintiff's contract as that obligation stood at the time the contract was made.

It is well settled that a provision in a state constitution may be a law impairing the obligation of a contract as well as one found in an ordinary statute. We are of opinion, therefore, that, as it regards plaintiff's case, this restrictive provision of the constitution of 1880 does impair the obligation of a contract. *Van Hoffman* v. *Quincy*, 4 Wall. 535; *Nelson* v. *St. Martin's Parish*, 111 U. S. 716.

The judgments of the Supreme Court of Louisiana are reversed and the cases are remanded to that court for further proceedings not inconsistent with this opinion.

IV. Assignment of Compensation.

BLISS V. LAWRENCE.

Court of Appeals of New York. October, 1874.
58 N. Y. 442.

Johnson, J. The controlling question in these cases is that of the lawfulness of an assignment, by way of anticipation, of the salary to become due to a public officer. The particular cases presented are of assignments of a month's salary in advance. But if these cases can be sustained in law, then such assignment may cover the whole period of possible service. In the particular cases before us, the claim to a month's salary seem to have been sold at a discount of about ten per cent. While this presents no question of usury (since it was a sale and not a loan for which the parties were dealing), it does present a quite glaring instance and example of the consequence likely to follow the establishment of the validity of such transfers, and thus illustrates one at least of the grounds on which the alleged rule of public policy rests, by which such transfers are forbidden. The public service is protected by protecting those engaged in performing public duties; and this, not upon the ground of their private interest, but upon that of the necessity of securing the efficiency of the public service, by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work, at such periods as the law has appointed for their payment. It is argued that a public officer may better submit to a loss, in order to get his pay into his hands in advance, than to deal on credit for his necessary expenses This may be true in fact, in individual instances, and yet may in general not be in accordance with the fact. Salaries are, by law, payable after work is performed and not before, and while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of law-makers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined

by the assignment to strangers of all the funds appropriated to salaries. It is true that, in respect to officers removable at will, this evil could in some measure be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees, by notice to the government, would on ordinary principles be entitled to receive pay directly and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service.

Some misapprehension as to the doctrine involved seems to have arisen from the fact that the modern adjudged cases have often related to the pay of half-pay army officers, which in part is given as a compensation for past services and in part with a view to future services. Upon a review of the English cases, it will appear that the general proposition is, upon authority, unquestionable, that salary for continuing services could not be assigned; while a pension or compensation for past services might be assigned. The doubt, and the only doubt, in the case of half-pay officers was as to which class they were to be taken to belong. It was decided that inasmuch as their pay was in part in view of future services, it was unassignable. Similar questions have arisen in respect to persons not strictly public officers, but the principle before stated has, in the courts of England, been adhered to firmly.

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In respect to American authority we have been referred to *Brackett* v. *Blake*, 7 Metcalf 335; *Mulhall* v. *Quinn*, 1 Gray 105; and *Macomber* v. *Doane*, 2 Allen 541, as conflicting with the views we have expressed. An examination of these cases shows that the point of public policy was not considered by the court in either of them, but that the question was regarded as entirely relating to the sufficiency of the interest of the assignor in the future salary to distinguish the cases from those of attempted assignments of mere expectation, such as those of an expectant heir. The court held that in the cases cited, the expectation of future salary being founded on existing engagements, was capable of assignment and that the existing interest sufficed to support the transfer of the future expectation. The only other case to which we have been referred is a decision of the Supreme Court of Wisconsin.

In *State Bank* v. *Hastings*, 15 Wis. 78, the question being as to the assignability of a judge's salary, the court say: "We were referred to some English cases which hold that the assignment of the pay of officers in the public service, judges' salaries, pensions, etc., was void as being against public policy, but it was not contended that the doctrine of those cases was applicable to the condition of society or to the principles of law or of public policy in this country. For, certainly, we can see no possible objection to permitting a judge to assign his salary before it becomes due, if he can find any person willing to take the risk of his living and being entitled to it when it becomes payable."

We do not understand that the English decisions really rest on any grounds peculiar to that country, although sometimes expressed in terms which we might not select to express our views of the true foundation of the doctrine in question. The substance of it all is, the necessity of maintaining the efficiency of the public service by seeing to it that public salaries really go to those who perform the public service. To this extent, we think, the public policy of every country must go to secure the end in view.

The judgment must be affirmed.

All concur.

Judgment affirmed.

But accrued salary may be assigned. Bangs v. Dunn, 66 Cal. 74; Schloss v. Hewlett, 81 Ala. 266.

BUCHANAN V. ALEXANDER.

Supreme Court of the United States. January, 1846.

4 How., 20.

Mr. Justice McLEAN delivered the opinion of the court.

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Six writs of attachment were issued by a justice of the peace of the above county of Norfolk, by boarding-house keepers, against certain seamen of the frigate Constitution, which had just returned from a cruise. The writs were laid on moneys in the hands of the purser, the plaintiff in error, due to the seamen for wages. The money was afterward paid to the seamen by the purser, in disregard of the attachments, by the order of the Secretary of the Navy.

The purser admitted before the justice that the several sums attached were in his hands due to the seamen, but contended he was not amenable to the process. The justice entered judgment against him on the attachments.

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The important question is whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service.

The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen.

It is not doubted that cases may have arisen in which the government, as a matter of policy or accommodation, may have aided a creditor of one who received money for public services; but this cannot have been under any supposed legal liability, as no such liability attaches to the government, or to its disbursing officers.

We think the question in this case is clear of doubt, and requires no further illustration.

The judgments are reversed at the costs of the defendants, and the causes are remanded to the State court, with instructions to dismiss the attachments at the cost of the appellees in that court.

The rule of the principal case is applied in the case of the officers of the states and of the local corporations. Dewey v. Garvey, 130 Mass. 86; Merwin v. Chicago, 45 Ill. 133.

V. Pensions.

PENNIE V. REIS.

Supreme Court of the United States. October, 1889.
132 United States, 464.

The court, in its opinion, stated the case as follows:

This case comes from the Supreme Court of the State of California. The petitioner is the administrator of one Edward A, Ward, deceased, who was a police officer of the city and county of San Francisco from the 24th of September, 1869, until his death, which occurred on the 13th of March, 1889.

On the 1st of April, 1878, an act of the legislature of California was approved, entitled, "An act to enable the Board of Supervisors of the city and county of San Francisco to increase the police force of said city and county, and provide for the appointment, regulation and payment thereof." Statutes of California of 1877, p. 879. The first section of this act authorized the Board of Supervisors to increase the existing force of the police, which consisted of one hundred and fifty members, not exceeding two hundred and fifty more; the whole number not to make in all more than four hundred; and provided that they should be appointed and governed in the same manner as the then existing force. The second section declared that the compensation of the two hundred and fifty, or such part thereof as the board might allow, should not exceed $102 a month for each one, and that the compensation of those then in office should continue at the rate prescribed by the acts under which they were appointed until June 1, 1879, when their pay should be fixed by a board of commissioners created under the act; that the police officers then in office should be known as the "old police," and those appointed under the act as the "new police;" and that the officers subsequently appointed to fill vacancies on the old police should receive the same pay as the new police, subject to the condition that the treasurer of said city and county should "retain from the pay of each police officer the sum of two dollars per month, to be paid into a fund to be known as the 'police life and health insurance fund,'" to be administered as provided in the act. The mayor, auditor and treasurer of the city and county of San Francisco were constituted a board to be known as the "police, life and health insurance board," and required from time to time to invest, as it might deem best, the moneys of the police

life and health insurance fund in various designated securities, to be held by the treasurer, subject to the order of the board. The act declared that upon the death of any member of the police force, after the first day of June, 1878, there should be paid, by the treasurer, out of the said life and health insurance fund, to his legal representative, the sum of one thousand dollars; that in case any officer should resign from bad health or bodily infirmity, there should be paid to him, from that fund, the amount of the principal which he may have contributed thereto; and that, in case such fund should not be sufficient to pay the demand upon it, such demand should be registered and paid in the order of its registry, out of the funds as received. Ward having been a police officer whilst this act was in force, the administrator of his estate demanded of the treasurer the one thousand dollars provided by it. There was in the treasury at the time the sum of forty thousand dollars. The treasurer having refused to pay the demand, the administrator applied to the Supreme Court for a writ of mandate upon him to compel its payment. To the petition for that writ the treasurer demurred on the ground that it did not state facts sufficient to constitute a cause of action; or entitle the petitioner to the writ of mandate, or to any relief whatever; and that the act of the legislature, passed March 4, 1889, entitled "An act to create a Police Relief Health and Life Insurance and Pension Fund in the several counties, cities and counties, cities and towns of the State," was a valid and constitutional enactment. Statutes of California, 1889, p. 56. This act creates a board of trustees of the police relief and pension fund of the police department in each county, city and county, city or town, to be known as the board of police pension fund commissioners; and provides for its organization and the administration of the fund, and for pensions to officers over sixty years of age, who have been in the service over twenty years, to those who have become physically disabled in the performance of their duties, and to the widows and children of those who lose their lives in the discharge of their duties, and for the payment of certain sums of money to the widows or children of those who die from natural causes after ten and less than twenty years' service, and regulates the evidence of disability; and that retired officers shall report to the chief of police at certain stated periods, and perform duty under certain circumstances, and for the forfeiture of pensions by misconduct, and for the meetings of the board, and prescribes their duties as to the fund.

Sections 12 and 13 of the act are as follows:

"SEC. 12. The Board of Supervisors, or other governing authority, of any county, city and county, city or town shall, for the purposes of said 'Police Relief and Pension Fund' hereinbefore mentioned, direct the payment annually, and when the tax levy is made, into said fund of the following moneys:

. . . . . .

"*Ninth.* The treasurer of any county, city and county, city or town shall retain from the pay of each member of police department the sum of two dollars per month, to be forthwith paid into said police relief and pension fund, and no other or further retention or deduction shall be made from such pay for any other fund or purpose whatever.

"SEC. 13. Any Police, Life, and Health Insurance Fund, or any fund provided by law, heretofore existing in any county, city and county, city or town, for the relief or pensioning of police officers, or their life or health insurance, or for the payment of a sum of money on their death, shall be merged with, paid into, and constitute a part of the fund created under the provisions of this act; and no person who has resigned or been dismissed from said police department shall be entitled to any relief from such fund: *Provided*, That any person who, within one year prior to the passage of this act, has been dismissed from the police department for incompetency or inefficiency, and which incompetency or inefficiency was caused solely by sickness or disability contracted or suffered while in service as a member thereof, and who has, prior to said dismissal, served for twelve or more years as such member, shall be entitled to all the benefits of this act."

The act also repealed all acts or parts of acts in conflict with its provisions. Under this act the treasurer refused to pay the money demanded by the administrator of Ward. The Supreme Court of the State held that this latter act was a valid law, and that it repealed the former act, and denied the prayer of the petitioner and dismissed the writ.

From that judgment the administrator has brought the case to this court on a writ of error.

Mr. Justice FIELD, after stating the case as above, delivered the opinion of the court.

It was contended in the court below that this latter act of March 4, 1889, violated that provision of the Constitution of the United States, and of the State, which declares that no person shall be deprived of his property without due process of law. The Supreme Court of the State held that this contention went on the theory that the deceased police officer had, at the time of his death, a vested

property right in the one thousand dollars of public money which the former statute had directed to be paid to his legal representative upon his death. The petitioner now insists that this statement of his contention below is erroneous; that he did not then contend and does not now contend that the fund in the hands of the treasurer was public money, but private money accumulated from the contributions of the members of the police force, and that by Ward's contribution the sum claimed became, on his death,—like money due on a life insurance policy—property of his estate. Such, at least, is his position, if we rightly understand it. Some plausibility is given to it by the language of the petition to which the treasurer demurred. The petition alleges that Ward, the deceased, contributed, out of his salary as a police officer, to the police life and health insurance fund, the sum of two dollars per month for each month from April 1, 1878, to and including the month of March, 1889, and that the whole amount of his contribution to that fund was $264; that, upon his death, there was due to the petitioner, as the legal representative of Ward, the sum of one thousand dollars, payable out of that fund; that it was the duty of the treasurer of that fund to pay it; and that there was in his possession, at the time, forty thousand dollars applicable to its payment.

The petitioner now contends that these several allegations are to be taken as literally true, from the fact that the treasurer demurred to the petition. But a demurrer admits only allegations of fact and not conclusions of law. When therefore a plaintiff relies for recovery upon compliance with the provisions of a statute, and attempts to set forth conformity with them, the court will look to that statute and take the allegations as intended to meet its provisions, notwithstanding the inaccuracy of any statement respecting them. If the pleading misstates the effect and purpose of the statute upon which the party relies, the adverse party, in demurring to such pleading, does not admit the correctness of the construction, or that the statute imposes the obligations or confers the rights which the party alleges. *Dillon* v. *Barnard,* 21 Wall, 430, 437. Notwithstanding, therefore, in this case, the petitioner avers that the deceased police officer contributed out of his salary two dollars a month, pursuant to the law in question, and, in substance, that the fund which was to pay the one thousand dollars claimed was created out of like contributions of the members of the police, the court, looking to the statute, sees that, in point of fact, no money was contributed by the police officer out of his sal-

ary, but that the money which went into that fund under the act of April 1, 1878, was money from the State retained in its possession for the creation of this very fund, the balance—one hundred dollars—being the only compensation paid to the police officer. Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had no such power of disposition over it as always accompanies ownership of property. The statute, in legal effect, says that the police officer shall receive as compensation, each month, not exceeding one hundred dollars, or such sum as may be fixed after June 1, 1879, by a board of commissioners created under the act, and that. in addition thereto, the State will create a fund by appropriating two dollars each month for that purpose, from which, upon his resignation for bad health or bodily infirmity, or dismissal for mere incompetency not coupled with any offence against the laws of the State, a certain sum shall be paid to him, and upon his death a certain sum shall go to his legal representative.

Being a fund raised in that way, it was entirely at the disposal of the government, until, by the happening of one of the events stated—the resignation, dismissal, or death of the officer—the right to the specific sum promised became vested in the officer or his representative. It requires no argument or citation of authorities to show, that in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the State impaired no absolute right of property in the police officer. The direction of the State, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority. The law of April 1, 1878, having been repealed before the death of the intestate, his expectancy became impossible of realization; the money which was to pay the amount claimed had been previously transferred and mingled with another fund, and was no longer subject to the provisions of that act. Such being the nature of the intestate's interest in the fund provided by

the law of 1878, there was no right of property in him of which he or his representative has been deprived.

If the two dollars a month, retained out of the alleged compensation of the police officer, had been in fact paid to him, and thus become subject to his absolute control, and after such payment he had been induced to contribute it each month to a fund on condition that, upon his death, a thousand dollars should be paid out of it, to his representative, a different question would have been raised, with respect to the disposition of the fund, or at least of the amount of the decedent's contribution to it. Upon such a question we are not required to express any opinion. It is sufficient that the two dollars retained from the police officer each month, though called in the law a part of his compensation, were, in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law, and, until used for the purposes designed, could be transferred to other parties and applied to different purposes by the legislature.

Judgment affirmed.

COMMONWEALTH V. WALTON.

Supreme Court of Pennsylvania. January, 1897.
182 Pennsylvania State, 373.

Opinion of Mr. Chief Justice STERRETT, Oct. 11, 1897:

In the relator's petition for the alternative writ, it avers among other things that it is a corporation, created by and existing under the laws of this state, whose objects as defined by its charter are to accumulate a fund from the dues of its members, from legacies, bequests, gifts and other sources, with which to pay pensions to members of the association and to families of deceased members; that its membership is twenty-three hundred and eighty-six (2386), including the director of public safety, the superintendent of police, all the police captains and lieutenants, two hundred and thirty-six (236) sergeants, two thousand and thirteen (2013) patrolmen, sixty-seven (67) patrol and van drivers and thirty (30) employees of the electric bureau; that it pays pensions to members who have become permanently incapacitated by reason of injuries received in the performance of actual duty, to members who have served

fifteen years, whatever may be the cause of incapacity (excepting cases in which it results from the member's own vicious habits), to members who have served twenty-five years, and to the widow or children or dependent parents of a member killed in the discharge of his duty, etc.; that in 1895 an ordinance was passed by the councils of said city of Philadelphia and approved by the mayor appropriating ten thousand ($10,000) dollars for the charter purposes of said Pension Fund Association; that in January of that year a warrant for the payment of said sum was duly drawn by the director of the department of public safety and presented to the then city controller, who refused to countersign the same; that his successor in office,—the present controller,—being unwilling to overrule the decision of his predecessor, declined to countersign the warrant; and praying that an alternative mandamus issue, etc.

In the city controller's return to the alternative writ all the facts recited in the petition are virtually admitted. The only reason he gives for his refusal to countersign the warrant is that the appropriation was to an association or corporation; and is in violation of law and of section 7 of article IX, of the constitution, which reads thus: "The general assembly shall not authorize any county, city, borough, township or unincorporated district to become a stockholder in any company. association or corporation, or to obtain or appropriate money for or to loan its credit to any corporation, association, institution or individual."

In support of the demurrer to this return the following reasons were assigned: (1) the return admits facts which show that the relator is entitled to relief; (2) it discloses no legal ground for refusal to countersign the warrant, and (3) the respondent has neither set up nor offered any matter or thing to defeat the right of the relator as disclosed by its petition.

The refusal of the court below to sustain the demurrer, and the entry of judgment thereon for the defendant, constitute the subjects of complaint in this appeal.

It is unnecessary to even outline the history of the constitutional prohibition above quoted.

It is evident from an examination of our cases on the subject that no strictly legitimate municipal purpose was intended to be prohibited. The evident purpose of the prohibition was to confine municipalities to the objects for which they were created and to restrain the legislature from authorizing any perversion of them. By the act of March 17, 1789, which appears to be still in force, the city councils of Philadelphia "have full power and authority to

make, ordain and establish such and so many laws, ordinances and regulations as shall be necessary for the welfare and comfort of the city." We have no right to assume, nor is there anything from which it may be fairly inferred that the constitutional prohibition in question was intended to revoke or curtail any of the powers or authorities with which the city councils were theretofore invested by the comprehensive grant above quoted. It is not even suggested that a reasonable appropriation by councils for the creation or maintenance of a police pension fund is not an appropriation to a strictly municipal use, and "necessary for the welfare and comfort of the city." A judiciously administered pension fund is doubtless a potent agency in securing and retaining the services of the most faithful and efficient class of men connected with that arm of the municipal service in which every property owner and resident of the city is most vitally interested. Reasons in support of this proposition need not be stated in detail. They are such as readily suggest themselves to every reflecting mind.

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There is no merit in the objection that councils delegated the distribution of the sum appropriated to the "Philadelphia Police Pension Fund Association," instead of distributing it themselves. If they were satisfied, as they doubtless were, that the distribution of the fund would be better effected through the agency of the association than by an agency of their own creation, they had a right to so provide. As we have seen, the association was incorporated for the express purpose of administering such funds on just and equitable principles. If it should attempt to divert any of the funds to improper purposes ample redress could be had by application to the proper court.

It follows from what has been said that the demurrer should have been sustained, and a peremptory writ awarded as prayed for.

Judgment reversed, and judgment is now entered in favor of the plaintiff on the demurrer, and peremptory writ awarded as prayed for.

IN THE MATTER OF THE APPLICATION OF CATHARINE F. MAHON, APPELLANT, FOR A WRIT OF MANDAMUS AGAINST THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, RESPONDENT.

Court of Appeals of New York. May, 1902.
171 New York, 263.

Appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered February 12, 1902, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus directing the defendant to place the name of the relator on the list of retired teachers entitled to receive as an annuity one-half of salary paid her before retirement, and dismissed the proceeding.

The facts, so far as material, are stated in the opinion.

CULLEN, J. By chapter 296 of the Laws of 1894 there was enacted a provision for retiring and pensioning on half pay male teachers in the city of New York who had served thirty-five years, and female teachers in that city who had served for thirty years. The fund for the payment of these pensions was to consist of fines and deductions from teachers' wages made for any cause and from donations and legacies that might be made to it. Chapter 91 of the Laws of 1898 added to the fund five per cent of the excise money or license fee belonging to the city of New York. The relator had been a teacher in a public school in the city of New York, from which position she retired in September, 1892. In 1900 an act was passed (Chap. 725, laws of that year) by which the board of education of the city was directed to place the relator and thirty-two other teachers, who had also been retired before the establishment of the pension system, on the list of retired teachers entitled to receive as annuities one-half the salaries paid to them while in service, and to pay to them such annuities from the time of their respective retirements not earlier than the enactment of the statute of 1894. The respondent having declined to place the relator's name on the list, this proceeding was instituted to compel it to take such action.

We agree with the learned Appellate Division that the statute of 1900 is unconstitutional and approve the able opinion delivered by that learned court. That the excise money appropriated to the pension fund is public money is plain. (*People ex rel. Einsfeld* v. *Murray*, 149 N. Y. 367; *Fox* v. *Mohawk & H. R. Humane Society*,

165 N. Y. 517.) I think it is equally plain that the proceeds of the fines and deductions from teachers' wages are also public moneys. (*Pennie* v. *Reis*, 132 U. S. 464.) They certainly were the moneys of the city of New York before they were appropriated to the payment of teachers' wages, and when that appropriation failed because through misconduct or absence the teachers were no longer entitled to receive them, they necessarily remained the property of the city. I do not see, however, how a contrary view would help the relator. If they are to be regarded as belonging to the teachers the legislature could not alter the purpose towards which they were originally devoted. Being the moneys of the city of New York, the question is presented whether the legislature could lawfully appropriate them for pensions to persons who had been employees of the city at a time when no pension system was provided by law.

We think not. In *Town of Guilford* v. *Supervisors of Chenango County* (13 N. Y. 143) the broad doctrine was laid down that "The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independent of express constitutional restrictions, it can make appropriations of money whenever the public well being requires or will be promoted by it, and it is the judge of what is for the public good." This remained the law till 1875, when the people thought it necessary to impose restrictions, which was done by the constitutional amendments adopted in that year. Section 10 of article 8 provides that "No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation," and section 8 of article 3, "The legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor." These amendments eliminated all considerations of gratitude and charity as grounds for the appropriation of public moneys, except so far as by article 8 it is provided that these restrictions shall not prevent the municipalities named from making such provision for the aid and support of their poor as may be authorized by law. The claim of the relator falls in direct terms within the restrictions of section 28 of article 3. The relator was a public servant or employee of the city and the legislature has sought to grant her extra compensation. The argument of her counsel only emphasizes the conflict between

the statute and the Constitution. He contends: "The act of 1900 is as though the State said to the worn-out and decrepit teachers, 'You have not been paid enough for your services, and we will pay you what you deserve.'" It is exactly such action on the part of the legislature that the constitutional amendment was intended to prevent. Extra compensation is compensation over and above that fixed by contract or by law when the services were rendered. No one would assert that as between private individuals there arises any equitable or moral obligation to pay for services more than the stipulated compensation, where no services have been rendered additional to those contemplated by the contract. There was no moral obligation on the city of New York to establish a pension system in favor of teachers. Most of the servants of the State and most of the teachers in the public schools enjoy no right to be pensioned for services. The question of establishing a system of pensions is one of policy, not of obligation. The legislature might well think that in a large city where teaching is adopted as a calling to be pursued for years, and often for life, it would be wise to provide a system of pensions as an inducement both to service at low wages and also to good conduct in service. But these considerations have no application to the case of officers or employees who are not in service at the time the pension system is established or in force. As to such persons the grant of a pension is a mere gratuity.

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PARKER, Ch. J., GRAY, O'BRIEN, BARTLETT, HAIGHT and WERNER, JJ., concur.

Order affirmed.

STATE V. ROGERS.

Supreme Court of Minnesota. July, 1902.

87 Minnesota, 130.

LEWIS, J. Action by relator to obtain a writ of Mandamus requiring respondent, as comptroller of the city of Minneapolis, to sign a warrant drawn by the board of education upon the city treasurer for the sum of $608.37, in favor of John A. Schlener, as trustee of the so-called "Teachers' Retirement Fund." The amount of the warrant represents one per cent. of the salaries of all the teachers employed in the public schools in Minneapolis for the

month of November, 1901. An alternative writ was issued by the court below requiring respondent to show cause why he should not sign the warrant. Upon the return day respondent moved to quash the alternative writ. The motion was granted, and relator appealed from the judgment entered thereon.

The petition alleged that on May 28, 1901, the relator entered into a written contract of employment with the board of education of Minneapolis to teach during the school year of 1901-1902, at a salary of $135 per month, and the contract of employment contained the following clause:

"It is agreed that the board may deduct monthly from your salary one per cent. thereof, which, with other funds that may be contributed for the same purpose, shall create a permanent teachers' retirement fund, which shall be held invested, distributed, and paid out only according to rules and regulations of the board of education respecting such fund."

The rules and regulations referred to in this contract are too long to be inserted in full in this opinion, but the most important sections requiring consideration may be abbreviated as follows:

Section 124: From and after July 1, 1900, there shall be deducted from the salaries of all teachers regularly in the employ of the board, monthly, one per cent. thereof, which sum so deducted shall constitute a teachers' retirement fund, which shall be held, invested, and distributed in the manner and for the benefit of the persons prescribed by these rules and regulations. Such fund shall be divided into a permanent fund and an annuity fund. The first $20,000 shall be accumulated with one-fourth of the increase therefrom, and shall constitute a permanent fund, no part of which shall be used to pay any annuity or expense. The remainder of the retirement fund, including the other three-fourths of the income from the permanent fund, shall constitute the annuity fund, out of which all annuities and expenses shall be paid.

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. . . . The beneficiaries of the fund are as set forth in section 130:

"Teachers who shall have taught in the Minneapolis public schools for a period aggregating twenty years or more of actual service, and who, subsequent to the first day of July, 1900, either at their own request, or on motion of the board of education, shall be or shall have been retired by the board of education from service therein on account of age or mental or physical disability, shall, from and after such retirement and until his or her death, receive,

quarterly, in equal installments, out of said annuity fund, the following annuities respectively, to-wit: (1) Teachers who shall have so taught for a period aggregating twenty years, and not exceeding twenty-five years, shall each receive an annuity not exceeding $200 each, per year. (2) Teachers who shall have so taught for a period aggregating twenty-five and not exceeding thirty years, shall each receive an annuity of not exceeding $225 each, per year. (3) Teachers who shall have taught for a period aggregating thirty years or more, shall each receive an annuity of $250 each, per year."

Then follow certain provisos, and section 131, which reads:

"If any teacher shall be retired by the board of education after fifteen and before twenty years' service in the public schools of Minneapolis for any of the causes aforesaid, such teacher upon retirement shall receive back the sums so deducted from his or her salary."

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Upon the part of appellant it has been argued that the clause in the contract with the board of education permitting a deduction of one per cent. of the salaries affects merely the mode of payment of that percentage of the salaries, and is equivalent to an assignment by the teachers of that portion of their salaries to the trustee fund, and that the payment of such percentage of the salaries into the trustee fund is incident to and within the power of the board of education. Upon the other hand, it is contended by respondent that the board of education possessed no authority to make the contracts referred to, and that its act in passing the resolutions and regulations, as well as in exacting the contract from the teachers, was ultra vires and void; also that the one per cent. of the salaries thus diverted and paid into the trustee fund was a part of the public moneys of the district, and the act of the board in diverting it from its legitimate channel was ultra vires.

We must first consider the authority with which the board of education is vested. The powers of the board are found embraced within the following laws: Sp. Laws 1878, c. 157, as amended by the following acts, to-wit: Sp. Laws 1879, c. 62; Sp. Laws 1881, c, 114; Sp. Laws 1881 (Ex. Sess.), cc. 49, 52; Sp. Laws 1883, c. 233; Sp. Laws 1885, cc. 86, 97; Sp. Laws 1887, c. 22. The pertinent part of the law reads as follows:

"It shall have the entire control and management of all common schools within the city of Minneapolis. It shall be entitled to demand, have and receive all moneys which have accrued or shall

accrue to either of said districts, or to said united district, for school purposes, under any law of this state, or otherwise, and may appropriate and use such moneys for the support and maintenance of the schools within such district as such board may deem best. It may also hire or erect and maintain, as it shall deem best, school-houses and school-rooms, but it shall never erect any building upon land to which it has not the title in fee simple. It may employ superintendents and teachers, and make rules and regulations for the government of schools, and for the employment and examination of teachers, and prescribing their powers and duties; and prescribing the description, grading and classification of scholars and their management, and the course of instruction and books to be used, and all other matters pertaining to the government and welfare of schools. It may also make by-laws, rules and regulations for its government. . . . . Said board of education is hereby authorized and empowered to levy upon the taxable property in said city such taxes as will raise sufficient sums of money for all school purposes of every character, including the purchase of sites and building and repairs of school houses, and expenses incident to the maintenance thereof, and as will also provide for the prompt payment of all indebtedness of said district: Provided, that the aggregate annual levy of such taxes shall never exceed in any one year four mills on the dollar upon the assessed valuation of such district."

From a consideration of these statutes, we do not think the legislature intended to confer upon the board of education authority to exact from the teachers one per cent. of their salaries for the purposes outlined in the rules and regulations above referred to. The question before us must be disposed of upon the facts appearing in the petition, and we are not prepared to concede that the relator voluntarily relinquished that proportion for such purposes. The conviction cannot be avoided that the effect of such requirement, when applied to all teachers employed, must be to compel some of them, at least, to enter into the contract upon compulsion and without any expectation of receiving any personal benefit therefrom. It is difficult, therefore, to sustain the validity of the act on the part of the board of education in thus withholding the one per cent. of the salaries upon the ground that such a plan was voluntarily entered into by the teachers in signing the contract.

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We do not wish to intimate that the care of those who have given their life-work to a cause of such benefit to the public may not to

some extent be provided for when the limit of activity is reached, and the fund for that purpose be raised by taxation. It certainly conduces to the welfare of the school system to make it profitable and attractive for persons to devote themselves to the work, and, if it would attract to the service a better class of teachers, is not such an object for the benefit and welfare of the school system? Conceding, therefore, that the legislature might grant the power, within proper limits, to provide a fund for such a purpose, it is very clear that it has not been done by the enactments above referred to. At the time of the passage of these laws we are not aware that any such power had been exercised by boards of education within this state. The legislature had never attempted to deal with the subject, and no board of education had ever endeavored to put it in use. There is no reason for assuming that the legislature contemplated any such object, and there is certainly nothing within the language employed to intimate that such unusual and extraordinary power was intended to be implied.

The authority of the board is also questioned upon the ground that the money retained is in fact public money, and not the private funds of the teachers. It does not seem very material whether the money so assigned be considered public or private funds,—the result must be the same. But it is interesting to notice what the practical effect is of carrying out the plan outlined in the petition. If the entire salary had been paid to relator, and he had then voluntarily relinquished or paid back one per cent. thereof for the purposes expressed, it would clearly be private money; but one per cent. never had been paid in fact, and it never was contemplated that it would be. When the relator entered into the contract he surrendered absolute control over that portion of his salary, and, in effect, entered into a contract with the board that his salary would be ninety-nine per cent. of the amount nominally stated. So from this view of the case it appears to us that the money retained never left the treasury, but remained public money, and the board of education had no authority to divert it from the uses mentioned in the statute.

Judgment affirmed.

See also Hubbard v. State (Ohio), 58 L. R. A. 654, which holds that under a constitutional provision requiring all taxation to be equal and uniform the legislature may not require deductions from the pay of officers to be paid into a pension fund.

CHAPTER VII.

THE EXERCISE OF OFFICIAL AUTHORITY.

I. General Prerequisites of Valid Action.

1. Territorial Jurisdiction.

PAGE V. STAPLES.

Supreme Court of Rhode Island. May, 1881.

13 R. I., 306.

Exceptions to the Court of Common Pleas.

This action was trespass for assault and false imprisonment brought in the Court of Common Pleas. The defendant, Staples, a deputy sheriff of the county of Providence, arrested the plaintiff Page on a writ issued by the justice court of the town of Glouces-ter, May 31, 1879, and made returnable June 14, 1879, in an action of trover brought by one Jedidiah Sprague against said Page. The arrest was made June 5, 1879, in the town of Scituate. At the trial in the Court of Common Pleas, Page adduced testimony to show . . . . that Staples, in conducting him to the county jail in the county of Providence, carried him through a part of Kent county.

The plaintiff was non-suited by the presiding justice, and brought the case into this court by exceptions to the non-suit.

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Matteson, J.

We do not think that the defendant can justify the taking of the plaintiff through a part of Kent county for the purpose of committing him to the jail in Providence county. In the absence of statutory provisions, the power of a sheriff is limited to his own county. He is to be adjudged as sheriff in his own county and not elsewhere. He cannot, therefore, execute a writ out of his own county, and if he attempts to do so becomes a trespasser. The only exceptions to this principle are, that having a prisoner in his custody upon a writ of *habeas corpus,* he has power, by virtue of the writ, to travel through other counties, if necessary in order to take his prisoner to the place where the writ is returnable; and he may,

also, upon fresh pursuit, retake a prisoner who has escaped from his custody into another county. *Platt* v. *The Sheriff of London*, Plowd. 35, 37; *Hammond* v. *Taylor*, 3 B. & A. 408; Watson's Sheriff, 60, 61; *Avery* v. *Seeley*, 3 Watts & Serg. 494, 497. In the case at bar the plaintiff did not escape from the defendant's custody into Kent county, but was voluntarily taken by the defendant into that county. The moment they crossed the line between the counties, into Kent county, the defendant ceased to have any authority over the plaintiff. He had no more right to detain him in that county than he would have had to arrest him there.

The exception is sustained and the case remanded to the Court of Common Pleas for a new trial.

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2. Disqualification on Account of Personal Interest.

GOODYEAR V. BROWN.

Supreme Court of Pennsylvania, May, 1893.
155 Pa. St. 514.

Opinion by Mr. Justice WILLIAMS, May 22, 1893:

It is true, as the appellants contend, that there is no enactment to be found in the statute book of this State which in words forbids the secretary of internal affairs to receive his own individual application for a land warrant, grant it, cause a survey to be made and returned upon it, accept the return of survey, pass upon the validity of the survey, as a member of the board of property, and finally cause a patent to issue to himself, the individual, for the land included within it. But it does not follow that everything may be done by a public officer that is not forbidden in advance by some act of assembly. Remedies are provided for evils when they are discovered, and rules of law are applied when a necessity arises for their application.

What was alleged in this case, and was held by the learned judge of the court below, is that dealings between a public officer and himself as a private citizen that bring him in collision with other citizens, equally interested with himself in the integrity and impartiality of the officer, are against public policy. In a general way it may be said that public policy means the public good. Anything that tends clearly to injure the public health, the public

morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy. . . . . We proceed, therefore, to inquire whether the defendant's title is affected by public policy. The office of secretary of internal affairs is a comparatively new one, having been created by the present constitution of the State. Its powers and duties are defined by the act of May 11, 1874. . . . . Among other duties and responsibilities committed to the secretary of internal affairs are all those formerly resting on the surveyor general. He has the survey and sale of the public lands, and, in connection therewith and as incidental thereto, he has the exclusive custody of all books, documents, maps and returns or surveys relating to them, to State and county lines, to State and turnpike roads, and to railroads, canals and other public improvements. Applications for the survey of any part of the public lands must be made to him. If granted he issues the warrant to the proper deputy surveyor to make the survey. When the survey is made it must be returned to him for acceptance. The patent or deed of the State issues only on his certificate or direction. Every step in the patentee's title, every particle of evidence relating to each step, down to the delivery of the patent, is to be found in his office, if it is to be found at all; and can only be seen under his direction. All copies for use in the courts must be made and certified by him. In fact, he is the custodian of all the public records relating to all the lands in the State; and upon his fidelity titles of vast importance and value depend. . . . . But he is more than a custodian of these evidences of title. He is, by virtue of his office, a member of the board of property, and sits therein as a judge to hear and determine all questions raised by caveat or petition affecting returns of survey, the location of warrants and warrant lines, the rights of settlers and the titles of patentees. The nature of his duties disqualifies such an officer from dealing with his own department, or sitting in judgment on his own or his adversary's title of the public lands, as clearly as does the office of president of the court of common pleas disqualify the individual who holds the office from personally conducting his own litigation, in his own court before himself.

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We have in the case now under consideration a striking and startling illustration of the practical operation of the doctrine

contended for by the appellant. The plaintiff is an extensive manufacturer of sawed lumber in the county of Potter. Among the lands purchased by him for the supply of his mills with timber is a large tract known as No. 4714 in the warrantee names of Isaac Wharton et al. This tract purports to be one of a block of surveys made at the same time, of which No. 4724 is a member and is called for as an adjoinder of 4714. The plaintiff and those through whom he derives his title have paid taxes on this tract for nearly a century, and have understood and claimed that it was located adjoining No. 4724, as the calls would indicate. In 1891 the deputy secretary of internal affairs procured a warrant to be issued to himself for nine hundred acres of land alleged to be vacant, situated in the county of Potter and adjoining No. 4724. It was promptly returned by the deputy surveyor for Potter county with a survey covering most if not all of the land claimed by plaintiff under No. 4714. The plaintiff becoming aware of the survey so made appeared before the board of property to protest against the attempt to appropriate his land. This tribunal promptly decided against him, and a patent was as promptly issued to the deputy secretary of internal affairs, with the fullest knowledge on the part of both the secretary and his deputy that the land was claimed under an older warrant. There was nothing left for the plaintiff but an appeal to the courts. This he had to make with the knowledge that every paper, and every scrap of evidence relating to the issuing, location and return of his warrant, was in the possession and under the control of his adversary. He could have an inspection of these papers and documents only by permission of the officer who, as an individual, was interested in defeating his title. He must apply to the same officer for the copies needed for the trial of his cause. The antagonism between the duties of the officer and the pecuniary profit of the man who held the office is plain and direct. It was brought about by the voluntary act of the officer having at the time the fullest knowledge of the situation, and of the necessary consequences of his conduct. In such a contest the officer has an advantage never contemplated or provided for by the law makers. He is exposed to a temptation from which he should have fled. The department under his practical control is subjected to criticism and suspicions that have a tendency to create public distrust of the integrity of its administration, and of the security of titles depending on the records under its care. But the contagion of the example set by the deputy secretary is noticeable. When the trial was reached

in the court below, it turned out that the deputy surveyor who located the warrant of 1891, and who had the rightful custody of the records of that office, was put in an unfortunate position for his disinterestedness as a witness by the fact that his wife had become a part owner of the land under a grant from the deputy secretary. An experienced surveyor from an adjoining county, whose familiarity with the original lines in that region made his testimony of great importance in reaching a conclusion as to the proper location of 4714, had been placed in the same predicament, by the same expedient. His wife was also a part owner, deriving her title from the deputy secretary. Surely the owner of No. 4714 was *in gremio legis*. This remarkable combination may have been accidental. We presume it was innocent. Nevertheless to litigants whose property is at stake, and to speculators, measuring the acts of men by the common business standards, it suggests possible dangers and temptations on which we will not enlarge. Such dealings by an officer are to be regretted because of their necessary consequences; and a proper consideration for the public security, and for the confidence of citizens in the officers of the State, forbid them. Whether we consider the interests of the citizens for whose security and protection the State exists, or the preservation of public confidence in the purity of the administration of public affairs, or the honor and character of the officer as a public servant, the conclusion reached is the same. Public policy cannot tolerate such dealings by an officer with his own department or office. It will not uphold them.

It follows that the warrant issued to the deputy secretary of internal affairs confers no title, as against a claimant under an older survey, to the land in controversy. The warrant was issued contrary to public policy. The board of property should have refused to accept the return of survey under it and to permit a patent to issue for it. The learned judge of the court below rightly rejected it when offered on the trial, for the purpose of showing title in the appellants, and the judgment is now affirmed.

MOSES V. JULIAN.

Supreme Judicial Court of New Hampshire. December, 1863.
45 New Hampshire, 52.

Theodore Moses, on the 16th day of September, 1861, made his will, and on the 16th day of June, 1862, executed a codicil annexed to it, and subsequently died.

At the court of probate, held at Exeter, on the day of , 1863, for the County of Rockingham, the will was presented for probate by two of the executors named in it, the third having declined to act, and on the 14th day of January, 1863, it was proved and approved as said Moses' last will.

On the 26th day of February, 1863, the appellants, Luke Julian and his wife, Abigail T. Julian, who was a daughter, and one of the heirs at law of said Moses, claimed an appeal from the decree of the Judge of Probate, which was allowed, and was entered at the next time of the Supreme Judicial Court for said County, and at the June term, 1863, the executors acting, came into court and moved that the said instrument may be proved as the last will of said Moses.

Thereupon the appellants plead that the same ought not to be approved and allowed as aforesaid: I. Because, they say, that at the time of making and executing said instrument by said Theodore Moses, bearing date on said 16th day of September, 1861, it had no seal upon it; and this, etc., and issue was joined. II. Because, they say, that the Judge of Probate for said County of Rockingham was of counsel, and advised said Theodore Moses in relation to said paper, or instrument, dated on the 16th day of September, 1861. III. And because the Judge of Probate for the County of Rockingham wrote said instrument, and thereby being interested, approved and allowed said instrument, dated September 16th, 1861, in his official capacity. To the two last pleas there was a general demurrer. And, IV, because said instrument being indefinite and uncertain, is void: to this plea there is an issue to the country.

BELL, C. J. The most perfect integrity that can be in judges is no hinderance why the parties, who have causes depending before them, may not challenge them, or except against them, and why they ought not, of their own accord, to abstain from hearing causes in which they may have some interest, or where there may be some just ground for suspecting them, and they

themselves are obliged to declare the causes which may render them suspected, if the parties are ignorant of them; for although a judge may be above the weakness of suffering himself to be biased or corrupted, and may have resolution enough to render justice against his own relations, and in the other cases where it may be lawful for the parties to except against the judges, yet they ought to mistrust themselves, and not draw upon themselves the just reproach of a rash proceeding, which would be in effect a real misdemeanor. Domat Pub. Law, Lib. 2, Tit. 1, sec. 2, 14.

The judge, who is satisfied that he is legally disqualified to act in a case, ought not to wait until the parties object to him, but should refuse to hear the cause, by an entry on the docket that he does not sit in the case. *Edwards* v. *Russell,* 21 Wend. 64; *Paddock* v. *Welles,* 2 Barb. 333; *Steamboat Co.* v. *Livingston,* 3 Cow. 724; *Ten Eyck* v. *Simpson,* 11 Paige 179; *Great Charte* v. *Kensington,* 2 Stra. 1173; Bouvier Law Dict'y, Art. "Judge;" Pothier, Pro. Civ. ch. 2, sec. 5. This is the immemorial practice of the courts, and of constant occurrence. *Regina* v. *Justices,* 14 E. L. & E. 93; S. C. 16 Jur. 612.

As the judge is not supposed to know anything of the cases to be tried until the trial is commenced, unless by accident, it may aften happen that he knows nothing of any cause of disqualification. It is, therefore, the right and duty of the party who desires to object to, or recuse a judge, as he has a right to do, (2 Dom. 559) to make his objection by a petition to the court, setting forth the facts on which he relies as a disqualification, and requesting that the judge would not sit on the trial of the case. Just. Code 1. 1, Tit. 1, 16 Voet ad Pand. L. 5, Tit. 1, 43. The facts being unquestioned, the judge may cause the entry to be made that he does not sit. If the facts alleged are not admitted by the judge, or are denied by the adverse party, it is the duty of the party objecting to lay before the court the proof of their truth, upon which the other judges, if others are present, will decide, or the judge, or justice, if alone, will decide. Pothier, *ub. sup.*

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The 35th article of the Bill of Rights of New Hampshire declares that "it is essential to the rights of every individual, his life, liberty, property and character, that there should be an impartial interpretation of the laws and administration of justice." And "it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." This is but the

expression of a well known rule of universal justice everywhere recognized, which the people of this State were anxious to secure as far as possible from all doubts, or possibility of legislative interference. It is one of the great principles of the common law, for which the people of England had struggled for ages, and which they ultimately succeeded in establishing against the strenuous efforts of a tyrannical government. We can have no higher authority than this for denouncing as illegal everything which interferes with the entire impartiality of every legal tribunal.

I. No man ought to be judge in his own cause, is a maxim aimed at the most dangerous source of partiality in a judge. *Peck* v. *Freeholders, &c.*, 1 N. J. 656; *Hawley* v. *Baldwin,* 19 Conn. 585; *Russell* v. *Perry,* 14 N. H. 132; *Allen* v. *Bruce,* 12 N. H. 418; Dig. I, 1, *de jurisdictione;* 1 Broke Ab. 177. Conusans 27; Broom's Maxims 84; Co. Litt. 141, a; Litt. sec. 212; Derby's case, 12 Rep. 114; Dig. L. 5, T. 1. 17. It is not necessary that a judge should be a party to the cause to create this disqualification. If he is interested in a suit brought in another's name, he is equally disqualified. *Foot* v. *Morgan,* 1 Hill 654; *Wright* v. *Crump,* 2 Ld. Ray 766.

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Generally an interest in the question, as distinct from a pecuniary interest in the result of the cause, is no valid ground of recusation, *Northampton* v. *Smith,* 11 Met. 390; Poth. Pro. Civ. ch. 2, sec. 5; *People* v. *Edmonds,* 15 Barb. 529. To this, however, there is an exception; where the judge has a law suit pending or impending with another person, which rests upon a like state of facts, or upon the same points of law, as that pending before him; this is a valid disqualification. *Davis* v. *Allen,* 11 Pick. 466; Ersk. Inst. Tit. 2, 26; Poth. *ub. sup.;* Voet ad Pand. L. 5, T. 1, 44.

II. Relationship or affinity to either party in interest, though only a stockholder in a corporation, *Place* v. *Butternuts,* &c., 28 Barb. 503, or not party to the suit, *Foot* v. *Morgan,* 1 Hill 654, is a cause of recusation by either, *Steamboat Co.* v. *Livingston,* 3 Cow. 724; *Kelley* v. *Hackett,* 10 Ind. 299; Poth. Pro. Civ. ch. 2, sec. 5; Dig. 47, 10, 5; Code du Pro. Civ. 378; Ersk. Inst. T. 2, 33; Durand's Spec. Juris. 19, in civil matters to the fourth degree at least, that is, to cousins german inclusive, *Sanborn* v. *Follows,* 22 N. H. 473; *Bean* v. *Quimby,* 5 N. H. 98; *Gear* v. *Smith,* 9 N. H. 63; Voet ad Pand. L. 5, T. 1, 45. In many jurisdictions the exclusion extends much further, *Oakley* v. *Aspenwall,* 3 Comst. 547;

Voet ad Pand. *ubi sup; People* v. *Cline,* 23 Barb. 200; *Post* v. *Black,* 5 Denio 166.

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III. The friendly or hostile relations existing between a judge and one of the parties, may be good ground of recusation, Voet *ub. sup.*

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Among this class of disabilities is that chiefly in question in this case, the fact that the judge, as is alleged, has acted as counsel for the party in the same cause; which has always been held everywhere to justify the suspicion and belief that, however upright he may be, he cannot avoid favoring the cause of his late client. It is consequently everywhere a just cause for the judge to withdraw, or for the party to recuse him. *Ten Eyck* v. *Simpson,* 11 Paige 179; *McLaren* v. *Cheney,* 5 Paige 532; Pothier and Voet *ub. sup;* Louisiana Code of Practice 159; Code Civ. Pro. 178; *State* v. *House,* 28 Miss. (7 Jones) 233; Dig. 47, 10, 5.

Our own reports abound with entries that ——— J., having been of counsel, did not sit, and the dockets furnish evidence abundant that the law which called for such entries was recognized and acted upon long before we had reports, and see *Regina* v. *Justices,* 14 E. L. & E. 93; *Smith* v. *Smith,* 2 Breenl. 408; *Whicher* v. *Whicher,* 11 N. H. 348; that one who has acted as counsel in taking depositions cannot act as a magistrate in taking others.

And our statute, which forbids any justice of the Supreme Judicial Court to sit upon the trial of any cause in which he has been concerned as party, or attorney, and forbids him to act as attorney, or to be of counsel, or to give advice in any matter which in the ordinary course of proceedings may come before the court of which he is justice, for adjudication, Stat. 1855, ch. 1659, sec. 23, must be regarded as a legislative recognition of the common law, applicable to all judges and judicial officers.

This objection is purely personal. It has no application to the case of near relatives of the judge having been counsel, Voet *ub. sup.*, nor to the judge having been counsel in any other case but, it will be held valid where the cause is substantially the same, though it may not be precisely identical.

It seems to us very clear, that, *a fortiori,* the acting as advocate and giving of counsel in a case, whence a cause in court may spring up, after the judge has received his appointment, must be good cause of disqualification as a judge, independent of any statu-

tory enactment. It is the fact that the judge has acted as attorney, counsel, law adviser, or advocate, in relation to the business in hand, that furnishes the just cause of exception, without reference to the time when such aid or counsel was given.

We have, then, to turn our attention to the constitutional and legal provisions bearing on this subject, to see how far, and with what effect, they bear upon the case, of which the principal question presented to us upon these pleadings is, how far the validity of a will, and the judicial powers of a judge of probate, are affected by the fact alleged that the judge of probate, in whose court the will must be proved, wrote the will, and counselled and advised the testator as to its form and execution.

The constitutional provisions bearing upon this subject are as follows: Part II, Art. 79—"No judge of any court, or justice of the peace, shall act as attorney, or be of counsel to any party, or originate any civil suit in matters which shall come or be brought before him as judge, or justice of the peace." Art. 81—"No judge, or register of probate, shall be of counsel, act as advocate, or receive any fees as advocate, or counsel, in any probate business which is pending, or may be brought into any court of probate in the county of which he is judge or register."

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The prohibition of the constitution applies to this case. Its effect is to disqualify the judge to sit in the hearing, or decision upon the proof of such a will. It does not necessarily imply any improper motives, since the practice has been common and without question. None such can be even suspected in the present case.

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The demurrers are sustained. As issues in probate cases are drawn under the direction of the court, we deem it proper to suggest that the issue upon the last plea is so drawn as to refer to the jury a question which must be decided by the court alone. If the indefiniteness and uncertainty alleged appear upon the face of the will, the course should be to crave oyer of the will, set it out upon the record and aver that it ought not to be proved, because it is void and inoperative by reason of indefiniteness and uncertainty, and a demurrer would properly refer the question to the court.

If the defect grows out of matter of fact not apparent on the face of the will, it should be set out on oyer and the matter of fact alleged so as to afford an opportunity to controvert the fact, or deny the conclusion.

3. Mandatory and Discretionary Duties.

FRENCH V. EDWARDS.

Supreme Court of the United States. December, 1871.

13 Wall. 506.

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This was an action for the possession of a tract of land situated in the county of Sacramento, in the state of California.

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The defendants asserted title to the premises under a deed executed by the sheriff of Sacramento county upon a sale upon a judgment rendered for unpaid taxes assessed on the property for the year 1864, and the whole case turned upon the validity of this tax deed.

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The court instructed the jury to find for the defendant; to which instruction the plaintiff excepted. Verdict was rendered on the 3d of April, 1867; and the bill of exceptions was signed and dated on the following 13th, and judgment on the verdict was entered on the following 26th, the court not having adjourned until after this date.

On error brought by the plaintiff the main question was whether the departure of the officer from the requirements of the statutes rendered the sale invalid.

Mr. Justice FIELD, having stated the case, delivered the opinion of the court, as follows:

There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they

are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise.

These positions will be found illustrated in numerous cases scattered through the reports of the courts of England and of this country. They are cited in Sedgwick's Treatise on Statutory and Constitutional Law (pp. 368-378), and in Cooley's Treatise on Constitutional Limitations (Ch. IV, pp. 74-78.)

Tested by them the sale of the sheriff in the case before us cannot be upheld. The provision of the statute, that he shall *only sell the smallest quantity* of the property which any purchaser will take and pay the judgment and costs, is intended for the protection of the taxpayer. It is almost the only security afforded him against the sacrifice of his property in his absence, even though the assessment be irregular and the tax illegal.

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Judgment reversed, and the cause remanded for a new trial.

Mr. Justice MILLER, dissenting.

SUPERVISORS V. UNITED STATES.

Supreme Court of the United States. December, 1866.

4 Wall. 435.

Mr. Justice SWAYNE delivered the opinion of the court.

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III. The important question in the case is whether the respondents are compellable to levy and collect, by taxation, the amount specified in the order of the court below.

The writ, if issued, must conform to the order.

The court below proceeded upon the act of February 16th, 1863. We have not found it necessary to consider any of the other acts referred to in the briefs.

That act declares that "the board of supervisors under township organization, in such counties as may be owing debts which their current revenue under existing laws is not sufficient to pay, *may, if deemed advisable,* levy a special tax, not to exceed in any one year one per cent, upon the taxable property of any such

county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes, and when collected to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court or board of supervisors, as the case may be, in liquidation of such indebtedness."

The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language, "*May, if deemed advisable,*" which accompanies the grant of power, and, as he contends, qualifies it to the extent assumed in his argument.

In *The King* v. *The Inhabitants of Derby,* Skinner, 370, there was an indictment against "diverse inhabitants" for refusing to meet and make a rate to pay "the constables' tax." The defendants moved to quash the indictment, "because they are not compellable, but the statute only says that *they may,* so that they have their election, and no coercion shall be." The court held that "*may,* in the case of a public officer, is tentamount to *shall,* and if he does not do it, he shall be punished upon an information, and though he may be commanded by a writ. this is but an aggravation of his contempt."

In *The King and Queen* v. *Barlow,* 2 Salkeld, 609, there was an indictment upon the same statute, and the same objection was taken. The court said: "When a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*: thus, 23 Hen. VI, says the sheriff *may* take bail. This is construed he *shall,* for he is compellable to do so."

These are the earliest and the leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the settled law of both countries.

In *The Mayor of the City of New York* v. *Furze,* 3 Hill, 614, and in *Mason* v. *Fearson,* 9 Howard, 248, the words "it shall be lawful" were held also to be mandatory.

The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest

or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.

In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose "a positive and absolute duty."

The line which separates this class of cases from those which involve the exercise of a discretion, judicial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category.

The Circuit Court properly awarded a peremptory writ of mandamus. We find no error in the record. The judgment below is

Affirmed.

MULNIX, STATE TREASURER V. MUTUAL LIFE INS. CO.

Supreme Court of Colorado. April, 1896.

23 Colorado, 71.

Mr. Justice CAMPBELL delivered the opinion of the court.

The Insurance Company, as petitioner, by mandamus, seeks to enforce the payment of a State warrant drawn by the State auditor upon the State treasurer. Prior to the convening of the seventh general assembly the secretary of state, in pursuance of the statute, by an advertisement duly made, invited sealed proposals for stationery and certain other articles required by said general assembly and the executive department of state for two years commencing on the 2nd of January, 1889.

Lawrence & Co. tendered a bid, which, upon investigation, was accepted by the secretary of state, and a contract was duly entered into with them for supplying such articles as were covered by their bid. Thereafter they furnished stationery and certain other articles to the general assembly and to the various executive departments, which were received and used by the state. The statement of accounts for the same were rendered to the then auditor of state, and by him audited, settled, approved and allowed, and thereupon

the auditor drew upon the treasurer the warrant which is the subject-matter of the controversy here, the same being on account for the articles so furnished. This warrant before the beginning of this proceeding, was duly indorsed to the petitioner, and presented by it to the then treasurer of the State, who refused payment.

An appropriation has been duly made by the general assembly for the payment of this claim, and the money to pay the warrant was in the state treasury at the time of its presentation, and is still there.

The treasurer made answer to the petition, from which, and the brief of the attorney-general, it appears that the sole defense relied upon is the illegality of the warrant, which illegality is said to consist in the fact that a part of the consideration therefor was illegal in this, that some of the articles furnished to the general assembly by the petitioner's assignors were not included in the advertisement, in their bid or contract, as is required by law in such cases. The court below awarded the peremptory writ, to which judgment the treasurer prosecutes this writ of error.

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There is no charge in these pleadings of fraudulent conduct on the part of the secretary of state in advertising for bids, or of fraud in the bid itself, or in the auditing of the account. The sole defense is that some of the articles furnished and received and used by the state were not embraced in the advertisement, or included in the bid of petitioner's assignors, or covered by their contract, but were purchased by the secretary of state in the open market.

This is conceded by the petitioner, and upon this fact the claim is made, on the one side, that this purchase was without authority of law, and *ultra vires* the secretary of state, while upon the other side the contention is that he had the implied power to make this purchase.

The parties agree that the warrant does not possess the qualities of negotiable paper, but is open to the same defenses as though the proceeding were to compel the auditor to allow the account and draw his warrant therefor. It is also agreed that if any part of the consideration is illegal, the warrant is void.

The rule is fundamental that "in cases of public agents, the government, or other public authority, is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act." Story on Agency (8th ed.) sec. 307*a*; Mechem on Public Officers,

sec. 834; *Whiteside et al* v. *United States* 93 U. S. 247; *Hawkins* v. *United States,* 96 U. S. 689; *Durango v. Pennington,* 8 Colo. 257; *Sullivan* v. *City of Leadville,* 11 Colo. 483.

As expressed in another form, it is said: "Every person who seeks to obtain, through his dealings with the office, the obligation of the public, must, at his peril, ascertain that the proposed act is within the scope of the authority which the law has conferred upon the officer." Mechem on Public Officers, sec. 829 *et seq.,* citing *The Floyd Acceptances,* 7 Wall 666 and other cases.

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It follows that the power to reject bids, or the duty to supply the departments of state with articles necessary for their use, which this act contains, does not carry with it, nor do both combined carry by implication, the power to disregard both the statute and the constitution, or confer the power to go into the open market and buy. The duty to secure these things might, by implication, give authority to buy in any reasonable way, were it not that this power is otherwise limited by the constitution and the statute; and this method, being the essential thing to protect the state, must be held to be exclusive and mandatory. The various other arguments adduced in support of the contrary rule do not address themselves to us with any degree of force.

. . . . . .

For the foregoing reasons the judgment of the district court is reversed and the cause remanded with directions to dismiss the proceeding.

Reversed.

But the exercise of discretionary duties may not be controlled by mandamus. State v. Whitesides, 30 S. C. 579, and State v. Wilson, 123 Ala. 259, *infra.* As to the liability for negligence in the performance of ministerial and discretionary duties respectively, see Robinson v. Rohr, 73 Wis. 436, and Goodwin v. Gulld, 94 Tenn. 486 *infra.*

STATE V. PATERSON.

Supreme Court of New Jersey. February, 1870.
34 New Jersey Law, 163.

SCUDDER, J. The board of aldermen of the city of Paterson, on June 28th, 1869, passed the following resolution, viz.: "WHEREAS, the city charter does empower the mayor and aldermen of the

city of Paterson to purchase grounds whereon to build a public market; therefore, be it

"*Resolved*, That the mayor and aldermen of the city of Paterson, deeming it right and expedient that the city should own a public market, this board do now, in accordance with the one hundred and seventy-fifth section, title ten, of the city charter, appoint Philip Rafferty, William G. Watson, and George Christie, commissioners, to proceed in the premises according to law, and purchase a site and build a public market thereon."

It is admitted for the purpose of this case, although the return is not complete, that the resolution was regularly passed and approved according to the requirements of the charter.

The prosecutor, Charles Danforth, a citizen, property owner, and tax-payer of Paterson has, by *certiorari* brought this resolution into this court to determine its legality.

Waiving for the present the consideration of several preliminary questions raised on the argument, let us consider the proper legal construction of the one hundred and seventy-fifth section of the charter referred to in the resolution, and afterwards the form of the resolution itself.

This section (*Laws* 1869, *p.* 769,) enacts "that for the purpose of carrying out and effecting the purposes and objects provided for and authorized in the one hundred and sixty-fifth, one hundred and sixty-seventh, one hundred and seventy-first, one hundred and seventy-second, and one hundred and seventy-third sections of this act, the mayor and aldermen of said city are hereby authorized and directed whenever they shall decide to carry out and effect such purposes and objects, or any of them, to appoint three discreet persons, residents and citizens of said city, as commissioners, who shall have full power and authority on behalf of, and in the name of said mayor and aldermen, to make all contracts and purchases, and to transact and perform all business necessary in relation thereto, or connected with any of such purposes and objects; and the acts and contracts so made by said commissioners and by them reported to the board of aldermen, shall be binding upon such mayor and aldermen, and upon the said city, as fully and completely as if they had been made directly by said mayor and aldermen;" . . . . . .

The sections referred to in this one hundred and seventy-fifth section all relate to certain public improvements, *viz.*, section one hundred and sixty-five, to public parks; section one hundred and sixty-seven, to a city hall and other buildings, and public mar-

kets; section one hundred and seventy-one, to water works; and sections one hundred and seventy-two and one hundred and seventy-three, to gas works.

. . . . . .

In the enumeration of the several powers conferred on the board of aldermen, found in the twenty-third section of the charter, under sub-division seventeen, it will be seen that they have the general power to "erect, establish and regulate public markets."

In the one hundred and sixty-seventh section it is enacted that the *mayor and aldermen* of the city of Paterson are authorized to purchase a suitable site or sites, and erect thereon one or more public markets. This legislative power and discretion are to be exercised through the board of aldermen, as we have already seen in the twenty-third section. They are to purchase a *suitable* site or sites, and erect thereon one or more public markets, and to employ *suitable* architects, engineers, and *other persons* necessary to accomplish these purposes.

They are herein required to use judgment and discretion in determining the suitableness of the site, and also of the architect, engineer, and other persons employed to accomplish the purpose. This they must use, and cannot delegate to others without express legislative authority. *Lyon* v. *Jerome,* 26 *Wend,* 485; *New York* v. *City of New York,* 3 *Duer,* 119, 131.

How far is this authority given in the one hundred and seventy-fifth section?

The mayor and the aldermen are therein authorized and directed, whenever they shall decide to carry out and effect these purposes and objects, or any of them, to appoint three discreet persons, who shall have power and authority, on behalf of and in the name of said mayor and aldermen, to make all contracts and purchases, and to transact all business necessary in relation thereto, &c., and their acts and contracts shall be binding on the corporation, as if made directly by the mayor and aldermen.

There is here, in my opinion, no necessary conflict of authority or of action. The board of aldermen must select a suitable site; they must select suitable architects and engineers. When the lot, and the plan and specifications are thus determined, then the board of aldermen are directed to appoint three commissioners, with certain qualifications, to contract and purchase, and to carry out the objects thus defined and settled. This construction, it appears to me, harmonizes the two sections. The commissioners become the ministerial officers and agents of the corporation to carry out its

resolves for a specified work. Upon report by them made, their contracts and purchases become binding on the city, and the board provides the funds for payment, according to the terms of the charter.

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Having thus considered the one hundred and seventy-fifth section in its relation to the one hundred and sixty-seventh section and the general terms of the charter, it remains to consider the form of the resolution itself.

It is manifest that the mayor and aldermen of Paterson have not selected a suitable site or sites, and that they have not employed suitable architects, and prepared plans and specifications for the proposed market, but in this resolution they have delegated these important duties to the commissioners. This they cannot do, and the resolution is fatally defective in these particulars. They are appointed in general terms to proceed according to law, and purchase a site and build a public market thereon. The whole subject is therefore left to their discretion; after determining that they deem it right and expedient that the city should own a market, and appointing three commissioners to purchase land and build, the mayor and aldermen have supposed their duties were fulfilled, until it should become necessary to provide funds for the payment of the contracts and purchases of the commissioners. In this they have erred.

The power and discretion given to them to appoint these commissioners is in derogation of their general authority to control and manage the affairs of the city, and must be construed strictly. It must appear that in exercising this authority the board of aldermen have not gone beyond the power conferred. It is necessary that courts should watch with the most jealous care the appointment of any such commission, however good may be the character of the persons appointed, where the authority conferred is so great, and some of the ordinary securities are omitted. The charge will be laid heavily upon the property of the citizens for the payment of the proposed improvements, and it must appear that every requirement has been observed.

The resolution is not within the terms of the charter, in the particulars above stated, and is therefore null and void.

. . . . . .

BEDLE and DALRIMPLE, Justices, concurred.

4. *Majority Necessary for Valid Action.*

RUSHVILLE GAS COMPANY V. CITY OF RUSHVILLE.

Supreme Court of Judicature of Indiana. November, 1889.
121 Indiana 206.

ELLIOTT, J. The mayor of the city of Rushville appointed a committee, composed of the members of the common council, to investigate and report upon the question of the expediency of buying an electric light plant and machinery. The committee, in due time, reported to the common council in favor of making the purchase. On the 3rd day of April, 1889, action was taken on the report at a regular meeting, at which all of the members of the common council were present, and the following resolution was introduced:

"*Resolved*, That the report of the special committee, relating to lighting the city, be adopted, and that the officers therein named be instructed to sign the contract named therein."

Three of the six members composing the common council voted in favor of the resolution, but the other three members, although present, declined to vote, and the mayor declared that it was adopted. By virtue of this resolution the city is about to enter into a contract with the companies named in the report for the purchase of an electric light plant and the power to run it, for which the city is to pay the sum of ten thousand one hundred and fifty dollars. Acting under the resolution, the Edison Manufacturing Company has put up poles, strung wires on them, and placed in operation a system of electric lights, and the city will buy the plant and machinery unless enjoined. The city has contracted with the Buckeye Engine Company for a steam engine and appliances to be used in operating the machinery of the Edison company plant, at a cost of two thousand two hundred dollars. Unless enjoined the city will issue bonds to pay for the plant, machinery, engine and appliances.

The meeting at which the resolution was adopted was a regular one, attended by all the members of the common council, and all who voted at all voted in favor of the resolution. The question, therefore, is: Does the fact that three of the members present declined to vote authorize the conclusion that the resolution was not legally adopted? In our judgment it does not.

The rule is that, if there is a quorum present and the majority of a quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required; all that is requisite is a majority of the number of members required to constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution and one had voted against it, or had not voted at all, no one would hesitate to affirm that the resolution was duly passed, and it can make no difference whether four or six members are present, since it is always the vote of the majority of the quorum that is effective. The mere presence of the inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence, rather than opposition. Their refusal to vote is, a declaration that they consent that the majority of the quorum may act for the body of which they are members.

. . . . . .

We cannot agree with appellant's counsel in the construction which they place upon the words of Judge Dillon found in section 279 of his work on Municipal Corporations, for, as we read what the author says, it is directly against the appellant. What is said by Judge Dillon is this: "So, if a board of village trustees consists of five members, and all or four are present, two can do no valid act, even though the others are disqualified by interest from voting, and, therefore, omit or decline to vote; their assenting to the measure voted for by the two will not make it valid. If three only were present they could constitute a quorum, then the votes of two, being a majority of the quorum, would be valid, certainly so where the three are all competent to act." In the first sentence Judge Dillon refers to cases where there is not a quorum present, because there is not the requisite number of qualified members in attendance. He is speaking of the effect of the presence of disqualified persons in that sentence, not of the effect of a vote of the majority of a quorum composed of qualified members of the body. In the last sentence he speaks of a case where there is a qualified quorum present, and he instances such a case as we have here, for here four would be a quorum, and, according to this rule, three of the four could adopt a measure if there were no opposing votes. The case referred to by the author in support of the proposition embodied in the first sentence quoted is that of *Coles* v. *Trustees*, 10 Wend.

659. In that case three of five town trustees were disqualified from voting, and there was, of course, no quorum of competent members, and consequently no capacity to act. The court said: "The act requires three out of five, or a majority, to make a quorum. If there were but three present, then the votes of two, being a majority, would be valid. Here were five trustees, three of whom were incompetent to vote by the act; and being so, it seems to me, so far as the vote was concerned, they were not trustees for any purpose." It is obvious, therefore, that no such case was before the court as that now before us, for here all the members were present, and the measure was adopted by a majority vote of the quorum.

. . . . . .

It would not benefit the appellant if we should hold that the councilmen present and not voting did, in effect, oppose the resolution and certainly the utmost that can, with the faintest tinge of plausibility, be claimed, is that their votes must be counted against the resolution. It is inconceivable that their silence should be allotted greater force than their active opposition would have been entitled to have assigned it had it been manifested. If we should assume that their votes are to be counted against the resolution, then the mayor had the casting vote, and, by declaring the resolution adopted, he gave it in favor of the measure. This is so expressly decided in *Mayor* v. *Orne*, 79 Maine 78. But we think that the law is as stated by Willcock, and that the members present and not voting assented to the adoption of the resolution.

Judgment affirmed.

McCORTLE V. BATES.

Supreme Court of Ohio. December, 1876.

29 Ohio St. 419.

Motion for leave to file a petition in error to the District Court for Noble county.

The original action was brought by the plaintiffs against Bethel Bates, Andrew J. Moore, Josephus Groves, E. H. Craft and I. Q. Morris, in the Court of Common Pleas of Noble county.

The following are the facts, so far as they are material to be noticed:

On the 13th day of October, 1870, the defendants were members of the board of education of Senaca township, in said county, and on that day they entered into an agreement in writing with one J. S. Wachob, of which the following is a copy:

"Mr. J. S. Wachob is hereby requested to forward to Herman Suabidissen, township clerk, the following list of articles, viz.: Seven excelsior globes, seven inches in diameter, mounted as per cut herewith, provided a majority of the members of the board of education of Seneca township, Noble county, Ohio, sign this order; and we hereby agree to pay for the same on or before the first day of September, 1871, with interest, at the price hereto annexed.

"The township clerk is hereby directed to issue an order on the township in the payment for the same in favor of said Wachob, payable as above specified, and he is further requested to call a special meeting of said board within days, at which meeting we agree with each other that we will ratify this contract.

"BETHEL BATES,
"ANDREW J. MOORE,
"JOSEPHUS GROVES,
"E. H. CRAFT,
"I. Q. MORRIS.

"October 13, 1870."

Then followed a long list of school apparatus with prices annexed, the price annexed to the globes contracted for being $15 each. The globes were delivered to the township clerk, who drew an order on the treasury of the township, as directed, for $105, in favor of Wachob, payable September 1, 1871. This order and Wachob's interest in the above-recited agreement were assigned by him to the plaintiff, after which the board of education, acting in its corporate capacity, repudiated the contract, and the treasurer refused to pay the order; whereupon the plaintiff brought his action against the members of the board signing his contract to recover upon their alleged individual promise to pay for the globes. The defendants demurred to a petition stating the foregoing facts, upon the ground that the facts stated were insufficient to constitute a cause of action. The demurrer was sustained and the petition dismissed. On error, the district court affirmed the judgment of the common pleas. Leave is here asked to file a petition to reverse both judgments.

BOYNTON, J. The contract sued upon having none of the attributes or immunities of commercial paper, the plaintiff, by the as-

signment by Wachob of his claim against the defendants, secured and succeeded to them such rights, and such only, as Wachob possessed at the time of the transfer.

Such defenses as would have been allowed had he retained the claim and brought suit upon it himself, are now admissible against the plaintiff. Assuming, without deciding, that by the understanding of the parties to the agreement the defendants incurred a personal liability, it is quite clear that there was no error in the action of the common pleas in sustaining the demurrer and dismissing the petition.

The request to Wachob to forward the globes, provided a majority of the board signed the order: the agreement to pay for them on or before September 1, 1871; the direction to the township clerk to "issue" an order on the township in favor of Wachob for the amount agreed upon; the request to the clerk to call a special meeting of the board for action upon the matter, and the agreements among the members signing the contract to ratify the same at such meeting, were all elements of the same transaction. The paper upon which they were written contained the price-list of school apparatus belonging to Wachob, and it was delivered to him after it was signed by the defendants. He was not only cognizant of its contents, but a party to its stipulations. The promise or agreement of the members of the board *inter sese*, to ratify the contract at the meeting to be called, was to the knowledge of Wachob a material inducement to the agreement to purchase, and made for his benefit. He accepted an order drawn on the treasurer in anticipation of such ratification. It was an agreement to avoid or evade personal liability, if any was incurred, by shifting it to the township. It is not unlike, in its legal aspect, a promise or agreement by a legislator, or member of a city or town council, to act and vote upon a pending measure, in a certain way, for a consideration paid. Such promise or agreement was clearly contrary to public policy, and therefore illegal and void. Its effect is to vitiate the whole instrument.

The board is constituted, by statute, a body politic and corporate in law, and as such is invested with certain corporate powers, and charged with the performance of certain public duties. These powers are to be exercised, and these duties discharged, in the mode prescribed by law. The members composing the board have no power to act as a board except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for that purpose, all their official proceed-

ings. They have, in their corporate capacity, the title, care and custody of all school property whatever within their jurisdiction and are invested with full power to control the same in such manner as they think will best subserve the interest of the common schools and the cause of education. They are required to prescribe rules and regulations for the government of all the common schools within the township. Clothed with such powers and charged with such duties and such responsibilities, it will not be permitted to them to make any agreement among themselves, or with others, by which their public action is to be, or may be restrained or embarrassed, or its freedom in any wise affected or impaired. The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of, and upon, the public matters intrusted to them, in the session provided by the statute. This cannot be, when the members by pre-engagement, are under contract to pursue a certain line of argument or action, whether the same will be conducive to the public good or not. It is one of the oldest rules of the common law, that contracts contrary to sound morals, or against public policy, will not be enforced by courts of justice—*ex facto illicito non oritur actio;* and the court will not enter on the inquiry whether such contract would, or would not, in a given case, be injurious in its consequences if enforced. It being against the public interest to enforce it, the law refuses to recognize its claim to validity.

Leave refused.

II. Powers of Officers.

A. The Power of Ordinance.

1. Basis of Power.

MORRIS V. CITY OF COLUMBUS.

Supreme Court of Georgia. February, 1898.

102 Ga. 792.

Cobb, J.

. . . . . .

All of the plaintiffs in error attack the constitutionality of the act of the General Assembly conferring authority upon the city council of Columbus to require vaccination in certain cases.

. . . . . .

The General Assembly conferred this authority upon the city of

Columbus in the exercise of its police power. . . . . We cannot see what there is in the present case to differentiate it in principle from a number of other cases in which private rights have been subordinated to the health and comfort of the public. Danger to the public health has always been regarded as a sufficient ground for the exercise of police power in restraint of a person's liberty. . . . . So far as we are aware no court has ever been called upon to pass on this exact question, but there are a few decisions in which the subject of vaccination is discussed and these show the trend of the judicial mind on the subject. In the Matter of Smith, 40 N. E. 497, was a case in which Smith and another were detained in quarantine under a resolution of the municipal authorities of the city of Brooklyn, declaring that "whenever any person in said city shall refuse to be vaccinated, such person shall immediately be quarantined, and detained in quarantine until he consents to such vaccination." The Court of Appeals of New York reversed the Supreme Court, General Term, for refusing to order the release of the persons detained. But the decision was put upon the ground that the power conferred upon the local legislature of Brooklyn was not sufficiently broad to cover the case of the appellants. In discussing the case, Gray, J., says: "I think no one will dispute the right of the legislature to enact such measures as will protect all persons from the impending calamity of a pestilence, and to vest in local authorities such comprehensive powers as will enable them to act competently and effectively. The question here is not whether the legislature had the power to enact the provisions of section 24 of the health law, but whether the respondent has shown that a state of facts existed warranting the exercise of the extraordinary authority conferred upon him." In *Potts* v. *Breen*, 47 N. E. Rep. 81, it was held that a school board could not make vaccination a condition precedent to admission to the public schools, when smallpox did not exist in the community, and when there was no reason for apprehending an epidemic of that disease, in the absence of express authority from the legislature. An examination of the opinion of the court shows, that while the question was not presented, they were clearly of the opinion that compulsory vaccination would be allowable in certain cases when express legislative authority was given. The court uses this language: "It is a matter of common knowledge that the number of those who seriously object to vaccination is by no means small, and they cannot, *except when necessary for the public health and in conformity to law* (italics ours), be deprived

of their right to protect themselves and those under their control from an invasion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description, however meritorious it might be." There are several cases holding that acts of the legislature authorizing school boards to require vaccination as a condition precedent to admission to the public schools is not an invasion of any constitutional right of the pupil. Duffield v. Williamsport, 162 Pa. 476, 25 L. R. A. 152; Bissell v. Davidson, 32 Atl. (Conn.) 348; Abeel v. Clark, 24 Pac. (Cal.) 383; In re Rebnack, 62 Mo. App. 8; In re Walters, 32 N. Y. Supp. 322. Pupils of schools constitute a general class of persons. If the legislature can authorize the imposition of this condition upon one class, why not upon another? . . . . . It seems to us, therefore, to be a necessary conclusion from the cases cited supra, holding a regulation requiring a vaccination of pupils as a condition precedent to admission in the public schools reasonable and constitutional, that the act now under consideration is a valid exercise of the police power. Under this view the decision in the present case is supported by direct authority. But however this may be, we hold that the legislature has power to pass an act compelling vaccination, and that it may delegate this authority to a municipal corporation. But while this is true, municipal corporations must have express authority from the legislature, as no such power will ever arise by implication. State v. Burdge, 70 N. W. Rep. 347; Potts v. Breen, supra. In no proper sense can the act of the General Assembly attacked in this case be said to deprive the plaintiffs in error of any right without due process of law, or to deny to them the equal protection of the laws. It follows, therefore, that the superior court did not err in refusing to sustain the petitions for *certiorari*.

Judgment affirmed. All the Justices concurring.

See also Boske v. Comingore, 177 U. S. 459; Blue v. Beach, 155 Ind. 121, In re Kollock, 165 U. S. 526; Dunlap v. United States, 173 U. S. 65, for power of regulation of heads of departments.

CITY OF EVANSVILLE V. MILLER.

Supreme Court of Indiana. February 26, 1897.
146 Ind. 613.

JORDAN, C. J. This action was instituted by appellee to prevent the collection of certain assessments, levied by the board of public works of the city of Evansville on certain real estate owned by appellee and situated within the city. The theory of the complaint is that this assessment of $199. is void by reason of the invalidity in part of an ordinance under which the city undertook to levy the said assessment. A trial resulted in a finding by the court in favor of appellee, and a judgment was awarded cancelling the assessment and adjudging void the lien claimed thereunder by the city.

. . . . . .

It is clear, we think, that the city of Evansville, through her duly constituted authorities, in ordering the removal of this partially destroyed building, and in assessing the expense of such work on appellee's real estate, proceeded under that part of section one of the ordinance which declares "that any building, &c. that shall be partially destroyed by fire, &c., and suffered by the owner to remain in such condition after being notified, &c., to remove, repair, &c., shall constitute a nuisance." The controlling question, therefore, for our decision is that which relates to the validity of this portion of the ordinance, for, as this is the basis upon which the city's proceedings rest, its invalidity must necessarily render them inoperative and void. Counsel for appellee deny that the common council of the city of Evansville has, either expressly or impliedly, the power to declare by ordinance that a building partially destroyed and suffered to remain in that condition, shall, by reason of such facts alone, necessarily constitute a nuisance. It will be seen that the ordinance in dispute ordains "that any building, &c., partially destroyed by fire, or any other cause, and suffered to remain in such condition after notice to the owner, &c., shall constitute a nuisance." The latter is declared to exist as the result of these naked facts, and authority is given to the department of public works to abate such declared nuisance at the expense of the owner of the property. These facts alone are the test. The ordinance erects no other standard by which the supposed nuisance is to be measured or determined. No reference or regard

whatever is had as to the condition, character, situation, or surroundings, which might tend to render the building unsafe in any manner to the public or a detriment to the health or convenience of the public. There is an entire absence of facts declared, tending to show that if such partially destroyed building is suffered to remain it may be productive of annoyance or injury to the public.

That such a building may become a nuisance if maintained by reason of the ruinous and weak condition of its walls or other parts, thereby rendering them liable to fall and do injury to persons passing by, or resulting in injury to an adjoining owner, is a well established legal proposition. It is said by an eminent author, that such a building, as last mentioned, on a public street is a public nuisance and a private nuisance to those owning property adjacent to it. Wood's Law of Nuisances, section 109. It is evident, however, that in such a case the nuisance would not consist alone in the fact that the building was one that had been partially destroyed, but in its being maintained in its unsafe or dangerous condition. It may, however, be maintained in a partially destroyed condition, and yet be harmless in all respects. The unsafe condition thereof depending on the extent of the destruction, and another feature to be considered would be whether it was remote from a public street or passway. But the ordinance does not take into account any of these facts or features, but expressly condemns and outlaws as a nuisance the maintaining of any partially destroyed building without regard to its character, as to danger, by reason of its weak condition, or location or surroundings. By section 23 of the act under which the city of Evansville is operating, its common council is empowered to declare what shall constitute a nuisance, and to require its abatement, and to assess the expenses of its removal against the person causing the same or suffering it to exist. Acts 1895, p. 259. But the rule is well settled that a municipal corporation, although empowered by law to declare what shall constitute a nuisance, may not declare that to be one which in fact is not. *First Nat. Bank* v. *Sarils,* 129 Ind. 201, and authorities there cited; *Baumgartner* v. *Hasty,* 110 Ind. 575; *Village of Des Plaines* v. *Poyer,* 123 Ill. 348, 14 N. E. 677; *City of Denver* v. *Mullen,* 7 Col. 345, 3 Pac. 693; *Everett* v. *City of Council Bluffs,* 46 Ia. 66; *Yates* v. *Milwaukee,* 10 Wall. 497; Tiedman Lim. Police Powers, section 122; Wood's Law of Nuisances, sections 742, 743 and 744; *Lippman* v. *City of South Bend,* 84 Ind. 276; Dillon Munic. Corp., section 374; *State* v. *Jersey City,* 29 N. J. L. 170; Beach Pub. Corp. sections 1026, 1029 and 1031.

We think it is clear, under the authorities, that the common council by the ordinance in controversy, attempted to declare that a nuisance which in fact, under the law, cannot be so considered, and therefore transcended the power with which it was invested. As asserted by the authorities, it would be a dangerous doctrine and fraught with much evil to recognize the authority of a municipal legislature to declare that a nuisance which its own caprice might deem proper to outlaw as such. Even though such power is expressly conferred my the legislature, it is utterly inoperative, unless the thing so declared to be a nuisance is one in fact, or was created or erected after the adoption of the ordinance and in defiance thereof. Wood's Law of Nuisances, section 744.

What the legislature cannot do directly in this respect it cannot authorize a municipal corporation to do. Without further extending this opinion, we are, under the authorities cited, constrained to hold that the part of section one of the ordinance, as indicated by the italics, is void for the reasons herein stated, and the proceedings thereunder by the city, involved in the case at bar, consequently, cannot be maintained.

Judgment affirmed.

But the legislature may declare a thing to be a nuisance provided its action is not so unreasonable as to result in depriving one of his property without due process of law. Health Department v. Trinity Church, 145 N. Y. 32, and Lawton v. Steele, 119 N. Y. 226, *infra.*

STATE V. FERGUSON.

Supreme Judicial Court of New Hampshire. July, 1856.

33 N. H. 424.

This case is submitted on the following agreed statement of facts:

The respondent was convicted and sentenced to pay a fine of five dollars and costs, by the police court of the city of Concord, on the fourth day of September, 1854, upon a complaint that the respondent, at the city of Concord, on the second day of September, 1854, not being then and there licensed to sell intoxicating liquors within the city of Concord, did then and there sell one glass of intoxicating liquor to one Edwin N. Fogg, contrary to the form of an ordinance of said city of Concord, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

SAWYER, J. By the provisions of section 17 of the act "to establish the city of Concord," passed July 6, 1849, power is given to the city council to make and establish ordinances and by-laws for numerous purposes, specifically set forth, and embracing a great variety of subjects.

. . . . . .

The ordinance in question goes beyond the authority conferred by either of these special provisions.

. . . . . .

The ordinance then is not established by virtue of any authority derived from these special provisions of the charter; and if such authority is to be found in the charter, it must be contained in the general provision that the city council may make any other by-laws and regulations which may seem for the well-being of the city, provided they be not repugnant to the constitution or laws of the State.

Assuming that the ordinance is but a new municipal regulation, upon a subject fairly within the scope of the general powers incident to such *quasi* corporations, ... the broad and comprehensive terms of the general provision are undoubtedly sufficient, if it be construed by itself, independent of the other provisions of the charter, to carry the power claimed.

But this statute, like all other legislative acts, is to be so construed that all its parts shall stand, if this may be done. For that purpose the meaning of each of its provisions is to be gathered by reading it in connection with all others, and thus construing it in the light of its context. The maxim, *ut res magis valeat quam pereat*, applicable no less to statutes than to wills and other instruments of a private character, can be satisfied only by so construing it.

. . . . . To hold, then, that the general clause confers the power, is in effect to expunge these special provisions from the charter, and not these only, but all the numerous clauses which go to limit and define the precise boundaries of the power to be exercised by the city in various cases specified for the enacting of by-laws and ordinances.

. . . . . .

The express grant, then, of the power of legislation upon a particular subject, limited by the terms of the grant in respect to its extent or objects and purposes, or in reference to the mode in which it is to be exercised, may be held, unless the contrary expressly appears to be the intention of the legislature upon a view

of the entire act, to exclude all authority to legislate upon that subject beyond the prescribed limits; and, in the absence of any further authority expressly granted, upon every other subject. There is nothing in the act to indicate a contrary intention in this case. On the other hand, the precise and carefully defined limitations upon the power conferred to legislate upon the various subjects contained in the special clauses of the act, would seem clearly to indicate that the legislature intended thereby studiously to guard against the exercise of the power by the city beyond the limitations so prescribed. Why were these precise and cautiously-worded limitations introduced? It is not a satisfactory answer to say that they might be swept away as unmeaning and useless by the next clause in the act; the general clause conferring the power to legislate in all cases. If the general clause had been wanting in the charter, it would seem that no power would have existed in the city to enact ordinances or by-laws upon any subject, or in relation to any matter, not embraced in the catalogue of cases specified in the special clauses as the subjects of legislation. That doctrine is well settled upon the authorities, and may well be sustained upon principle. It must be understood that the intention in the insertion of the general clause was to remove the implication which would otherwise arise to restrain the city from enacting by-laws upon other subjects, and thus to empower them, by virtue of the special provisions conferring express power in the specified cases, to legislate upon those subjects under the limitations prescribed, and, by virtue of the general clause, upon all other matters coming within the scope of their municipal authority, subject only to such limitations as the general laws may prescribe.

These views do not conflict with any of the authorities cited in support of the prosecution. In *State* v. *Clark*, 8 Foster, 176, the question was whether an ordinance of the city of Concord, passed under the authority of the charter, was valid, which prohibited the keeping of intoxicating liquors in any refreshment saloon, or *restaurant*. There was no pretence, in that case, of an implied limitation upon the legislative power of the city *on this subject*, by a special grant of power to make by-laws upon the subject of keeping intoxicating liquors in particular places, and the ordinance was held valid, under the general clause, as being a matter properly pertaining to the police of the city, such that a due regard to public policy and morals might require that such liquors should not be kept in those places. In that case the court commented upon *Heisembrittle* v. *Charleston*, 2 McMullen, 233; also cited in

the argument, and pronounced it to bear a very strong resemblance to the case then under consideration. The only question in the last case cited was whether an ordinance of the city prohibiting shopkeepers, unless licensed, from keeping spirituous liquors in their shops, or in any adjoining room, was authorized by a provision of the city charter vesting power in the city to pass "every by-law or regulation that shall appear to them requisite for the security, welfare and convenience of the city, or for preserving peace, order and good government therein." This comprehensive provision was in no way qualified or limited in reference to the subject matter of the ordinance or by any other provision of the charter.

The case of *Wadleigh* v. *Gilman*, 3 Fairfield, 403, also cited in the argument, is of the same character. That was an action of trespass against two of the city officers of the city of Bangor, for breaking and entering the close of the plaintiff, and removing a building standing thereon. The defendants justified under an ordinance of the city government, prohibiting the erection of wooden buildings within certain limits. The city charter conferred authority upon the city government to ordain and establish such laws and regulations, not inconsistent with the laws of the State, as should be needful for the good order of the city. As in the case of the Charleston ordinance, this broad provision was not limited, expressly or impliedly, by any other provision contained in the charter.

The conclusions then to which the court have arrived are, that the authority of the city council of Concord to enact by-laws and ordinances on the subject of the sale of spirituous and other intoxicating liquors, is defined and limited by the special provisions of the charter conferring power in relation to that matter, and to be exercised only in the cases and to the extent therein specified; and that the general clause conferring power to make any other by-laws and regulations was not intended to enlarge or extend the power conferred by the special provisions in relation to their various subject matters, but to give the power to make by-laws in relation to such other matters as may properly be the subjects of police regulation, and as are not expressly declared to be the subjects of municipal legislation by other provisions of the charter. Upon these views the ordinance cannot be sustained, and there must be an order to the court of common pleas that

The complaint be quashed.

Official powers are narrowly construed. See People v. N. Y., L. E. & W. R. R. Co., 104 N. Y. 58, *infra*.

2. Control of Courts.

CITY OF CLINTON V. PHILLIPS.

Supreme Court of Illinois. January, 1871
58 Ill. 102.

Mr. Justice THORNTON delivered the opinion of the court.

Appellee was arrested and prosecuted under an ordinance of the city of Clinton. He was found not guilty. The city prosecutes this appeal.

The city council adopted an ordinance prohibiting the sale of intoxicating liquors, of any kind whatsoever, and affixed penalties for its violation.

It was agreed that the prosecution was for a violation of section 5 of this ordinance; that the appellee was a druggist, engaged in business in the city, and as such had, for more than one year, sold spirituous liquors for medical purposes; but that he had not reported such sales to the city council, as the section required him to do.

. . . . . .

Errors enough have been assigned and points made to afford opportunity to write a volume upon the powers of the legislature and of a city government. This court has often decided as to the power of the legislature, over the sale and traffic in intoxicating liquors, and the right to confer it upon municipal corporations.

We propose to discuss one question only. Had the city council power to enact section 5 of the ordinance? The solution of this in the negative is decisive of the case.

The penalty annexed is not for the sale of spirituous liquors. This is expressly permitted to druggists, for sacramental, chemical, mechanical and medicinal purposes. It is merely for a failure to report quarter-yearly, the kind and quantity sold for such purposes, when and to whom sold, and on whose prescription or assurance. This report must be verified by the affidavit of the druggist, and of every clerk and servant in his employ.

Under this section, it is no offense to sell spirituous liquors for the purpose indicated. Neither is it one to sell without the prescription of a physician, nor without having ascertained, beyond

a reasonable doubt, the object of the purchaser. The only offence is the neglect to furnish a detailed statement of his business.

The section is suspicious in its spirit, and excessively stringent in its requirements. It permits the sale, and then imposes the most odious conditions. A mere venial omission is tortured into a grave offence, punishable with heavy penalty. The private citizen, vested with no public office or employment, should not be subjected to such inquisition.

All men have a right to the secure enjoyment of property, and to be protected in their houses, papers and possessions against unreasonable searches. This section is an invasion of the sanctity of private business, and ought not to be tolerated.

There was no power to enact it, and the judgment must be affirmed.

Judgment affirmed.

See also United States v. Symonds, 120 U. S. 46, and Campbell v. United States, 107 U. S. 407, as to power of courts to declare administrative regulations invalid. But courts may not enjoin the passage of an ordinance. Harrison v. New Orleans, 33 La. Ann. 222, *infra.*

IN THE MATTER OF AH YOU.

Supreme Court of California. February, 1891.

88 Cal. 99.

Application to the supreme court for discharge upon writ of *habeas corpus.* The facts are stated in the opinion of the court.

HARRISON, J. The petitioner was convicted in the police court of the city and county of San Francisco of a misdemeanor, for visiting a house of ill-fame, and on the seventh day of March, 1890, was sentenced to "pay a fine of four hundred dollars, and in default of payment thereof, that he be imprisoned in the county jail of said city and county at the rate of one day for each one dollar of fine until said fine is satisfied." Under a commitment issued upon this judgment he was immediately taken into the custody of the sheriff, and has since that day been confined in the county jail of San Francisco.

. . . . . .

The maximum amount of the punishment for this offense is not defined, but is left to the discretion of the court, except as it is qualified by the provisions of section 1 of order 1587, which reads as follows: "Any person violating any of the provisions of this order shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment."

. . . . . .

Municipal ordinances must be reasonable, and the penalties prescribed for their violation must also be reasonable as well as definite. It is not essential, however, that the precise amount of the penalty for each offense shall be designated in the ordinance. It is sufficient if it is left to the discretion of the court, within fixed, reasonable limits. The maximum limit must, however, be reasonable. Dillon on Mun. Corp., secs. 338, 341.

The legislature (Stats. 1861, p. 552) has given to the city and county of San Francisco power to "determine the fines, forfeitures, and penalties that shall be incurred for the breach of regulations established by its board of supervisors," with the maximum limit of one thousand dollars, or six months' imprisonment or both. But it does not follow that the city is authorized to affix this maximum penalty for the violation of every regulation that it may establish under its general power to define offenses and prescribe penalties therefor. It is not justified in prescribing the same penalty for each offense which it may define. Penalties should be prescribed with reference to the offenses which are committed, rather than to the power under which they may be prescribed. This power to "determine" the penalties which shall be incurred for the breach of its regulations has been conferred upon the city, and must be exercised by its board of supervisors, and not left to the discretion of the judge before whom the offense is tried. *Matter of Frazee*, 63 Mich. 408. The board of supervisors must itself fix, within limits which are reasonable, the penalty to be incurred for the violation of each offense. If, however, the board of supervisors does not determine the penalty in any other terms than that it shall not be less than twenty dollars, but leaves to the judge the power to fix the maximun amount of punishment which the legislature has authorized to be affixed for the violation of any offense, instead of fixing the penalty within reasonable limits, it gives to the judge the discretion of determining what the penalty shall be for each offense. This has the same effect as if it had itself affixed the maximum limit of the penalty at one thousand dollars. But

a municipal ordinance which should prescribe a fine of one thousand dollars, or even four hundred dollars, as the penalty for visiting a house of ill-fame, would be not only unreasonable, as imposing a punishment greatly disproportionate to the offense, but would also be inconsistent with the general principles of the Penal Code upon kindred topics.

. . . . . .

The act of which the petitioner was convicted is not enumerated among the crimes which are defined in the Penal Code, but is made an offense solely by virtue of the ordinance. The legislature has not deemed it necessary to prescribe any punishment therefor, and from the statutes which it has adopted upon kindred topics, the penalty allowed by the ordinance in question must be held to be not in harmony with its general policy.

. . . . . .

We are of the opinion that so much of the ordinance in question as permits a fine of one thousand dollars to be imposed as the penalty for visiting a house of ill-fame is unreasonable, and not in harmony with the laws of the State, and therefore void. The petitioner must therefore be discharged from custody.

It is so ordered.

An administrative authority which has the power to pass police ordinances and issue special orders of individual application has, even in the absence of a statutory provision to that effect, the right to impose reasonable penalties in the nature of a fine for a violation of its ordinances and orders, Mobile v. Yuille, 3 Ala. 137; but may not, without statutory authorization, provide arrest and imprisonment even for nonpayment of such fine, Brieswick v. Brunswick, 51 Ga. 639, or distress and sale of property for collection of the fine, White v. Tallman, 2 Dutcher N. J. L. 67. But violations of such ordinances or orders are often made by statute, misdemeanors punishable by imprisonment.

CITY OF CHICAGO V. QUIMBY.

Supreme Court of Illinois. April, 1865.
38 Ill. 274.

Writ of error to the Circuit Court of Cook County.

Action of debt by the city against Quimby, a member of the Board of Trade, for alleged violation of a city ordinance, in failing to have flour inspected by the city inspector. Quimby sold flour to one Stewart, and both parties by agreement had the same inspected by the Board of Trade inspector, and not by the city inspector.

Judgment in the Police Court was rendered for the city, which on appeal was reversed in the Circuit Court, whereon the city brings writ of error to this court.

Mr. Chief Justice WALKER delivered the opinion of the court.

. . . . . .

It was likewise insisted that a justice of the peace had no jurisdiction, because in this case the sale was of two hundred barrels of flour. A forfeiture of "five dollars for each and every barrel so sold, without such inspection," would make an aggregate sum of one thousand dollars. This would be nine hundred dollars beyond the jurisdiction of a justice of the peace. The city charter by the sixty-fourth division of the eighth section of chapter four, has limited the power of the city to impose fines and penalties, for breaches of its ordinances, to one hundred dollars. This ordinance is repugnant to their charter, so far as it operates to impose a penalty beyond one hundred dollars, and is to that extent inoperative. It being a single transaction, a recovery, if otherwise authorized, could only be had to the extent of one hundred dollars, and as the penalty could not be split, such a recovery would be a bar to any future proceedings for the balance. But even if a justice had jurisdiction, a recovery could not be had for more than one hundred dollars, as that is the limit of the penalty that can be imposed, and the transaction being but one and indivisible, that would be the limit of the recovery. The ordinance must therefore be construed to impose a fine of five dollars for each barrel sold in violation of its provisions, until the sum reaches one hundred dollars in the same sale. If the sale exceeded twenty barrels, still it would be but one hundred dollars, whilst if it was of twenty barrels or less it would be five dollars on each barrel. If any other construction which now occurs to us were given, the ordinance would have to be held void. It therefore follows that a justice of the peace has jurisdiction under this ordinance, as in other cases, as the penalty can never exceed one hundred dollars. The judgment of the court below must be affirmed.

Judgment affirmed.

B. Special Acts of Individual Application.

1. Exercise of Judicial Powers.

LANGENBERG V. DECKER.

Supreme Court of Indiana. November, 1891.

131 Indiana 471.

Coffey, J. The general assembly of the State passed an act, which was approved and went into force on the 6th day of March, 1891, entitled "An act concerning taxation, repealing all laws in conflict herewith, and declaring an emergency."

The act creates a State Board of Tax Commissioners, composed of five persons, viz., the Secretary of State, the Auditor of State, and the Governor of the State, who are styled *ex officio* members, and two persons of opposite political faith appointed by the Governor of the State. At the time the matters occurred, out of which this suit arose, the board was composed of the Secretary of State, the Auditor of State, the Governor of the State, Josiah N. Gwin and Ivan N. Walker.

By the provisions of the act the Governor of the State is the chairman of the State Board of Tax Commissioners.

Section 129 of the act provides that this board shall annually convene in the office of the Auditor of State on the first Monday of August each year for the purpose of assessing railroad property and equalizing the assessment of real estate; that it shall not be bound by any reports or estimates of value of railroad property, real estate or other property, as returned to the county auditors or to the Auditor of State, but shall appraise and assess all property at its true cash value, as defined by the act, according to its best knowledge and judgment, and so equalize the assessment of property throughout the State. It also contains this provision: "They shall have the power to send for persons, books and papers, to examine records, hear and question witnesses, to punish for contempt any one who refuses to appear and answer questions, by fine not exceeding one thousand dollars, and by imprisonment in the county jail of any county not exceeding thirty days, or both. Appeals shall lie to the Criminal Court of Marion county from all orders of the board inflicting such punishment, which appeals shall be governed by the laws providing for appeals in criminal cases from justices of the peace so far as applicable. The sheriffs of the sev-

eral counties of the State shall serve all process and execute all orders of the board.

Claiming to act under the power and authority conferred upon it by the provisions of this statute, the State Board of Tax Commissioners, on its own motion, caused a subpœna *duces tecum* to be issued to all the banks in the State, requiring the president, cashier and book-keeper, or either of them, of the bank named in the subpœna, to appear before the board, at the office of the State Board of Tax Commissioners, in the State-House in the city of Indianapolis, on a day named in the subpœna, and to bring and have with them, then and there, such books, papers and accounts of such banking institution as should fully disclose and show the names of all persons having money, bonds, stocks, notes or other property of value on deposit and in the custody of such bank on the 1st day of April, 1891, and the respective amounts of such deposits or other property in the custody of the bank, and to answer all questions which might be asked in relation thereto, or with reference to the property owned by the bank itself. The subpœna was signed by Joseph T. Fanning, as secretary of the board.

. . . . . .

One of the subpœnas was served upon the appellee, at the city of Evansville, where he resides, and where he is vice-president of a State bank known as the German Bank of Evansville. In answer to the subpœna he appeared before the State Board of Tax Commissioners on the 25th day of August, 1891, when there was present of the members of the board the following persons, and no others, viz.: Claude Matthews, Secretary of State, acting as president of the board; J. O. Henderson, Auditor of State, and Ivan N. Walker.

Upon his appearance he was duly sworn, when the following proceedings were had, viz.:

. . . . . .

"Q. State the aggregate amount of the individual deposits held by the German Bank of which you are vice-president on the 1st day of April, 1891. A. About $300,000.

"Q. Give the amount of money held on deposit by said bank on the 1st day of April, 1891, belonging to some one depositor.

"The witness: Before answering the question I respectfully ask the board whether there is any appeal, complaint, suit or proceeding of any kind pending before this board or elsewhere to assess any depositor, or to revise his tax list in any manner."

By the board: "No; we are exercising the power of discovery."

The witness: "I decline to answer, under the advice of counsel,

either as to the name of any depositor or the amount of his deposit."

"Q. Give me the amount of personal property, other than money, held by your bank, as custodian or agent, on the 1st day of April, 1891, such as notes, stocks, bonds or other property of value belonging to any one depositor." A. "I respectfully ask the board to state, before answer to the question just put, whether there is any appeal, complaint, cause or proceeding of any kind pending before this board or elsewhere to assess the property of said bank or any partner therein."

Answer by the board: "No."

The witness: "I decline to do so, under advice of counsel."

. . . . . .

"Q. You are now commanded to produce such books and papers of the German bank for the inspection of this board as will fully afford the information herein sought to be obtained, and which will discover the names of the depositors of said German bank on the 1st day of April, 1891, and the several amounts to their credit; also, such books as will show the names and description of the property of value held by said bank as custodian and agent on said day. A. As vice-president of said bank I now decline to produce any of its books or papers for the inspection of this board for any purpose."

Thereupon the State Board of Tax Commissioners, because of the refusal of the appellee to appear and answer the questions above set forth, and to give the information thereby sought to be elicited, assessed against him a fine of five hundred dollars, and that he stand committed until the fine be paid or replevied, and entered the following judgment: "Therefore, it is considered and ordered by the State Board of Tax Commissioners that Philip C. Decker, on account of his refusal to appear and answer questions, and his disobedience to the order of this board, be and hereby is fined in the sum of five hundred dollars ($500), and it is further considered by the board that said Philip C. Decker do stand committed to the jail of Marion county, Indiana, until said fine be paid or replevied."

Upon entering the foregoing judgment the secretary of the board delivered to the appellant, as the sheriff of Marion county, a commitment reciting the fact that the appellee had been fined the sum of five hundred dollars for contempt, and ordering that he be committed to the jail of Marion county until discharged by due process of law. Upon this commitment the appellee was arrested. He there-

upon filed his petition in the Marion Superior Court praying for a writ of *habeas corpus*.

To the writ issued upon this petition the appellant made his return stating, among other things, substantially the proceedings above set forth. To this return the appellee filed exceptions, which were sustained by the court, and an order was entered discharging the appellee from custody.

The assignment of error calls in question the propriety of the ruling of the Marion Superior Court in sustaining the exceptions to the return made by the appellant to the writ of *habeas corpus*.

. . . . . .

The solution of the question presented renders it necessary that we shall inquire:

First. As to what department of the State government the State Board of Tax Commissioners belong; and

Second. Into the nature of the power to fine and commit for contempt.

Article 3, section 1, of our State Constitution, is as follows:

"The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

. . . . . .

It can not, with propriety, be contended that the State Board of Tax Commissioners belongs to the legislative department of the State, for it has no power to enact laws. The general assembly can not delegate its law-making power to any other person or body. It can not be successfully maintained that the legislature could confer on the Governor of the State and the principal administrative officers of the State duties pertaining to the judicial department. Indeed, the learned Attorney-General admits, in argument, that the State Board of Tax Commissioners is not a court, and he does not contend that it can perform any function which is of a purely judicial character. As the State Board of Tax Commissioners is neither a legislative body nor a court, it must belong to the executive or administrative department of the State. That it does belong to that department, we think, is too plain for argument. It is charged with the duty of executing certain provisions of the revenue laws of the State, and when it has performed that duty its functions are at an end. But because it is a body belong-

ing to the executive or administrative department of the government it by no means follows that it may not perform functions which are, in their nature, judicial. Hearing and determining appeals from the county board of review, hearing witnesses and equalizing the appraisement of real estate, and assessing the railroad property named in the act, is the performance of a duty judicial in its nature.

. . . . . .

It is often a matter of much difficulty to determine whether the functions exercised by a tribunal of this character are such as pertain exclusively to the courts, or whether they are such as it may lawfully exercise. . . . . .

That it was in the power of the general assembly to confer on the State Board of Tax Commissioners the power to hear and determine appeals from the county boards of review, to equalize the assessments of real estate and to assess the railroad property named in the act is not doubted, and the question as to whether the legislature could confer upon it the power to fine and imprison the citizens of the State for contempt of its authority depends upon whether such action is purely judicial or only *quasi* judicial.

. . . . . .

. . . . . The power to punish for contempt belongs exclusively to the courts, except in cases where the Constitution of a State expressly confers such power upon some other body or tribunal. Our State Constitution confers such power upon the general assembly, but upon no other body. The doctrine that such power rests with the courts alone is based upon the fact that a party can not be deprived of his liberty without a trial. To adjudge a person guilty of contempt for a refusal to answer questions, the tribunal must determine whether such questions are material, and whether it is a question which the witness is bound to answer, otherwise it can not be determined that the witness is in contempt of its authority in refusing to answer.

So far as we are informed, the trial of a citizen involving the question of his liberty, by any civil tribunal other than a court, has never been sustained, unless the power to do so was conferred by some constitutional provision. For the reasons above given, our conclusion is that so much of the act under consideration as attempts to confer on the State Board of Tax Commissioners power to fine and imprison for contempt is in violation of section 1, article 3, of the State Constitution, and is void. It follows that such board had no authority to fine the appellee and commit him to the

jail of Marion county, and that the Marion Superior Court did not err in ordering his release.

It is claimed, however, by the learned Attorney-General that the conclusion here reached is in conflict with the conclusion in the cases of *ex parte Mallinkrodt*, 20 Mo. 493; *Swafford* v. *Berrong*, 84 Ga. 95, and *Noyes* v. *Byxbee*, 45 Conn. 382.

We have given each of those cases a careful consideration.

. . . . . .

In the case of *Swafford* v. *Berrong, supra,* it was held that the act of the general assembly incorporating the town of Clayton conferred upon the governing board or council judicial powers, with authority to try offenders alleged to have violated the town ordinances; and inasmuch as it was a court, when sitting for that purpose, it had the power to punish for contempt. No question of the authority of the general assembly to confer such power, under the Constitution of Georgia, was involved in the case or decided by the court.

. . . . . .

In our opinion these authorities do not conflict with the conclusion we have reached in this case.

. . . . . .

Judgment affirmed.

See also People v. Chase, 165 Ill. 527, holding that the power to decide, even subject to appeal to the courts, the title to real estate is a judicial power which may not be granted by the legislature to an administrative officer. But the power to order arrest for non-payment of taxes may constitutionally be vested in an administrative officer. Commonwealth v. Byrne, 20 Grattan 165, *infra.*

INTERSTATE COMMERCE COMMISSION V. BRIMSON.

Supreme Court of the United States. October, 1893.

154 United States 447.

Mr. Justice HARLAN delivered the opinion of the court.

This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July, 1892, by the Interstate Commerce Commission under the act of Congress entitled "An act to regulate commerce." . . . . .

The petition was based on the twelfth section of the act authorizing the commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books and papers.

The Circuit Court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended. 53 Fed. Rep. 476, 480.

. . . . . .

The twelfth section, 26 Stat. 743, c. 126, the validity of certain parts of which is involved in this proceeding, provides as follows: . . . . . "For the purpose of this act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. . . . . And in case of disobedience to a subpœna the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as contempt thereof." . . . . .

The nature of the present proceeding, instituted pursuant to the authority conferred by that section, will appear from the following summary of the pleadings and orders in the cause:

Prior to the 14th of June, 1892, informal complaint was made to the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act, that the Illinois Steel Company, a corporation of Illinois, had caused to be incorporated under the laws of that State the Calumet and Blue Island Railroad Company, the Chicago and Southeastern Railway Company of Illinois, the Joliet and Blue Island Railway Company, and the Chicago and Kenosha Railway Company, for the purpose of operating its

switches and side tracks at South Chicago, Chicago, and Joliet, respectively, and engaging in traffic by a continuous shipment from cities and places without to cities and places within Illinois. . . . . .

The commission, of its own motion, decided to investigate the matters set forth in said informal complaint by inquiring into the business of all said railroad companies and the management thereof with reference as well to the alleged making of illegal, unjust and unreasonable rates, as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, and the failure . . . . . to file with the commission the above contracts, agreements, and tariffs.

An order was thereupon made by the commission, which recited the facts of the informal complaint made to it, and required each of the above-mentioned companies to make and file in its office in Washington, a full, complete, perfect, and specific verified answer, setting forth all the facts in regard to the matters complained of. . . . . .

Each of the companies which, according to the allegations of the petition, the Illinois Steel Company had caused to be incorporated, filed its answer with the commission, and averred that it had in all respects complied with the obligations imposed upon it by the laws of the State and of the United States; that it was not engaged in interstate commerce within six months preceding the filing of the complaint against them; and it answered "No" to each of the above specific questions. . . .

The commission, notwithstanding these denials, conceived it to be their duty to proceed with the investigation by the examination of witnesses and the books and papers of the corporations involved, and especially to ascertain whether the Illinois Steel Company was the owner in fact of the railroads, which it was alleged to have caused to be incorporated, and whether such incorporations were for the purpose of giving to that company an undue and illegal preference in the transportation of its property and freight.

Among the witnesses subpœnaed to testify before the commission was William G. Brimson, the president and manager of the five roads so incorporated in Illinois. . . . . Having stated that his companies did not engage in the transportation business for everybody and anybody having occasion to employ them, and that their business was limited to the above companies with which they had traffic arrangements, he was asked whether the companies of which he was president and manager were owned by the Illinois

Steel Company. The witness, under the advice of counsel, refused to answer this question.

J. S. Keefe, secretary and auditor of the five roads mentioned, was examined by the commission as a witness. He admitted that he had in his possession a book showing the names of the stockholders of the Calumet and Blue Island Railway Company, but refused, upon the demand of the commission, to produce it. He also refused to answer the question, "Do you know, as a matter of fact, whether the Illinois Steel Company owns the greater part of the stock of these several railroads?"

William R. Stirling, first vice-president of the Illinois Steel Company, was also examined as a witness, and after stating that that company had a contract with the five railroads in question to handle the railroad business at the five "plants" of the steel company, refused to answer the question, "Is that the only relation which your company sustains to these railroad companies?"

On the succeeding day the commission issued a *subpœna duces tecum*, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock books of those companies. A like subpœna was issued to William R. Stirling, as first vice-president of the steel company, commanding him to appear before the commission and produce the stock books of that company. Keefe and Stirling appeared in answer to the subpœnas, but refused to produce the books or either of them so ordered to be produced.

The commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe, and Stirling to appear before that body and answer the several questions propounded by them and which they had respectively refused to answer, and requiring Keefe and Stirling to appear and produce before the commission the stock books above referred to as in their possession.

The answers of Brimson, Keefe, and Stirling in the present proceedings, besides insisting that the questions propounded to them, respectively, were immaterial and irrelevant, were based mainly upon the ground that so much of the Interstate Commerce Act as empowered the commission to require the attendance and testimony of witnesses and the production of books, papers, and documents, and authorized the Circuit Court of the United States to order common carriers or persons to appear before the commission and produce books and papers and give evidence, and to punish by pro-

cess for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the Circuit Courts of the United States to use their process in aid of inquiries before the commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

. . . . . .

Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the establishing that exception." 4 Wheat. 316, 409.

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An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witness before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules.

It is to be observed that independently of any question concerning the nature of the matter under investigation by the commission—however legitimate or however vital to the public interests the inquiry being conducted by that body—the judgment below rests upon the broad ground that no *direct* proceeding to compel the attendance of a witness before the commission, or to require him to answer questions put to him, or to compel the production of books, documents, or papers in his possession relating to the subject under examination, can be deemed a case or controversy of which, under the Constitution, a court of the United States may take cognizance, even if such proceeding be in form judicial.

. . . . .

As the Circuit Court is competent under the law by which it was ordained and established to take jurisdiction of the parties, and as a case arises under the Constitution or laws of the United States when its decision depends upon either, why is not this proceeding judicial in form and instituted for the determination of distinct issues between the parties, as defined by formal pleadings, a case or controversy for judicial cognizance, within the meaning of the Constitution? It must be so regarded, unless, as is contended, Congress is without power to provide any method for enforcing the statute or compelling obedience to the lawful orders of the commission, except through criminal prosecutions or by civil actions to recover penalties imposed for non-compliance with such orders. But no limitation of that kind upon the power of Congress to regulate commerce among the States is justified either by the letter or the spirit of the Constitution. Any such rule of constitutional interpretation, if applied to all the grants of power made to Congress, would defeat the principal objects for which the Constitution was ordained. As the issues are so presented that the judicial power is capable of acting on them finally as between the parties before the court, we cannot adjudge that the mode prescribed for enforcing the lawful orders of the Interstate Commission is not calculated to attain the object for which Congress was given power to regulate interstate commerce. It cannot be so declared unless the incompatibility between the Constitution and the act of Congress is clear and strong. *Fletcher* v. *Peck,* 6 Cranch 87, 128. In accomplishing the objects of a power granted to it, Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

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We are of opinion that a judgment of the Circuit Court of the United States determining the issues presented by the petition of the Interstate Commerce Commission, and by the answers of the appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. A final order by that court dismissing the petition of the commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process. If there is any legal reason why appellees should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition.

In view of the conclusion reached upon the only question determined by the Circuit Court, what judgment shall be here entered? The case was heard below upon the petition of the commission and the answers of the defendants. But no ruling was made in respect to the materiality of the evidence sought to be obtained from the defendants. Passing by every other question in the case, the Circuit Court, by its judgment, struck down so much of the twelfth section as authorized or required the courts to use their process in aid of inquiries before the commission. Under the circumstances, we do not feel obliged to go further at this time than to adjudge, as we now do, that that section in the particular named is constitutional, and to remand the cause that the court below may proceed with it upon the merits of the questions presented by the petition and the answers of the defendants and make such determination thereof as may be consistent with law. Any other course would, it might be apprehended, involve the exercise of original jurisdiction, and might possibly work injustice to one or the other of the parties.

For the reasons stated the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

Mr. Chief Justice FULLER, Mr. Justice BREWER, and Mr. Justice JACKSON dissented.

Mr. Justice FIELD was not present at the argument of this case, and took no part in the consideration and decision of it.

For cases illustrative of the effect of the principle of the separation of powers on the competence of the legislature to confer powers on

officers, see Gordon v. United States, 117 U. S. 697; United States v. Deuell, 172 U. S. 576; Fox v. McDonald, 101 Ala. 51; People v. Chase, 165 Ill. 527; Field v. Clark, 143 U. S. 649; Blue v. Beach, 155 Ind. 121; *In re* Kollock, 165 U. S. 526.

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2. Notice to Persons Affected.

STUART V. PALMER.

New York Court of Appeals. June 18, 1878.

74 N. Y. 183.

This action was brought by plaintiff against defendant Palmer, as collector of taxes of the town of New Lots, to vacate an assessment upon lands of plaintiff as a cloud upon the title, and to restrain the said collector from collecting the same.

EARL, J. . . . . .

We shall examine and consider but one question, which we deem decisive of this case, and that is whether the act authorizing the assessment was constitutional. If it was unconstitutional, no valid assessment could be made under it; and the invalidity of the assessment would always appear, and it would constitute no such cloud upon title as to call for the interference of a court of equity. (*Newell* v. *Wheeler*, 48 N. Y. 486; *Marsh* v. *City of Brooklyn*, 59 id. 280.)

Here was an expense for a local improvement of more than $100,000. The commissioners were to ascertain what land within the district of assessment was benefited, and then to apportion and assess the said sum upon such land, in proportion to benefits. The assessment when made was declared to be a lien upon the land, and its payment could be enforced by a sale thereof.

I am of opinion that the Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to

be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice.

. . . . . .

The legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these "without due process of law" has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty, or property. This the legislature cannot do nor authorize to be done. "Due process of law," is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. (*Weimer* v. *Brueinbury,* 30 Mich. 201.) This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights.

It is difficult to define with precision the exact meaning and scope of the phrase, "due process of law." Any definition which could be given, would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice MILLER of the United States Supreme Court, to leave the meaning to be evolved "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." (*Davidson* v. *Board of Administrators of New Orleans,* 17 Albany Law Journal, 223.) It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this. . . . . It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an op-

portunity to be heard at some stage of the preceeding. That "due process of law" requires this, has been quite uniformly recognized.

In *Butler* v. *Sup'rs of Saginaw* (26 Mich. 22), where a tax had been imposed for building drains, Judge COOLEY says: "It is not the province of any mere legislative direction to impose pecuniary burdens upon the people. The power to tax is indeed plenary; but taxation implies public interest and in cases like these now in question it also implies proceedings *in pais* in some of which the taxpayers have a right to take part and be heard. Any attempt to lay the burden in disregard of these principles must necessarily be inoperative." In *Patten* v. *Green* (13 Cal. 325), BALDWIN, J., says: "We think it would be a dangerous precedent to hold that an absolute power resides in the supervisors to tax land as they may choose without giving any notice to the owner. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of any such power." In *Philadelphia* v. *Miller* (49 Penn. 440), AGNEW, J., speaking of taxation, says: "Notice or at least the means of knowledge is an essential element of every just proceeding of which affects rights of persons or property."

In *Matter of Trustees of N. Y. Prot. Epis. Public School* (31 N. Y. 574), Judge DENIO says: "It is manifestly proper that the taxpayers should have notice of the imposition proposed to be laid upon them, and an opportunity for making suggestions and explanations to the proper administrative board or office." In *Ireland* v. *City of Rochester* (51 Barb. 414), Judge JAMES C. SMITH, speaking of the imposition of assessments, says: "It is in the nature of a judicial proceeding against them, and its effect is to take their property for public use. . . . . It is a plain principle of justice applicable to all judicial proceedings, that no person should be condemned, or shall suffer judgment against him without an opportunity to be heard;" and he says that an act assessing "persons without notice transcends the power of the legislature, and is itself void." *In the Matter of Ford* (6 Lans. 92) Judge GILBERT says: That the duties of assessors in making assessments are of a judicial nature and that "it is a fundamental rule that in all judicial or *quasi* judicial proceedings, whereby the citizen may be deprived of his property he shall have notice, and an opportunity of a hearing before the proceedings can become effectual." That assessors act judicially, see also, *Barhyte* v. *Shepherd* (35 N. Y. 238), and *Clark* v. *Norton* (49 N. Y. 243).

In *Overing* v. *Foote* (65 N. Y. 263), Mr. Commissioner REY-

NOLDS says: "The general theory under our laws for taxation of property is that the citizen to be affected must have some sort of notice of the proceeding to be had against his property and that in some form he may be heard, if wrong is apprehended, before any portion of his estate is seized for the support of government; and I think all our laws for the assessment of property for the purpose of taxation are founded upon this notion of justice." In *Davidson's Case* in the Supreme Court of the United States above referred to, the doctrine that the citizen is entitled to due process of law in the imposition of assessments, is distinctly recognized. In that case, an assessment upon the real estate of the plaintiff in error in the city of New Orleans for draining the swamps of that city was resisted in the State courts and was brought by a writ of error to the United States Supreme Court on the ground that the proceeding deprived the owner of his property without due process of law, and the court refused to interfere with the assessment on the ground that the party assessed had notice and an opportunity to appear before a proper tribunal and contest. Mr. Justice BRADLEY writing one of the opinions says: "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessments for local improvements, or none of these; and if found to be suitable or admissible in a special case it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law." In *Murray's Lessee* v. *Hoboken Land and Improvement Co.* (18 How. [U. S.] 272) it was held that the provision as to "due process of law" was a restraint on the legislative as well as the executive and judicial powers of the government. Judge COOLEY in his valuable work on Taxation, at p. 265, says: "In such proceedings, therefore, it must be a matter of the utmost importance to the person assessed, that he should have some opportunity to be heard, before the charge is fully established against him; and it would seem to be a dictate of strict justice that the law should make reasonable provisions to secure him as far as may be against partiality, malice or oppression;" and on p. 266 he says: "We should say that notice of proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is due process of law for these cases, and it is not to be assumed that constitutional provisions carefully framed for the protection of property, were intended, or could be construed to

sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment."

While it may be said that there is no authority directly in point, yet as has been shown there is much judicial expression in favor of the proposition I am endeavoring to maintain. The cases must have been extremely rare in this country where assessments have been imposed without notice or an opportunity to be heard, and hence the application of "due process of law" to the subject of assessments and taxation has not been much discussed. The case nearest in point is *Davidson's Case*. That, as has been seen, was a case of assessment, and the United States Supreme Court had jurisdiction of it only because it involved the constitutional provision as to "due process of law." If the citizen in the case of assessments is not entitled to the protection of this constitutional provision then the court would have dismissed that case on that ground, but it considered the case upon the merits and decided that there was due process of law.

No case, it is believed, can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien; but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense as the judgment-debtor is deprived of his by the judgment.

We are therefore of opinion, for the reasons stated, that the acts under consideration were unconstitutional and void, and hence that no assessment laid under them could be a cloud upon title to land, and that the judgment should therefore be affirmed with costs.

All concur; CHURCH, Ch. J., FOLGER and MILLER, JJ., concurring in result.

Judgment affirmed.

See as to the power of the courts to review collaterally official determinations affecting the right of property where no hearing was provided by law, People *ex rel.* Copcutt v. Board, 140 N. Y. 1, *infra*.

CHICAGO &c. RAILWAY CO. V. MINNESOTA.

Supreme Court of the United States. October, 1889.
134 United States 418.

This was a writ of error to review a judgment of the Supreme Court of the State of Minnesota, awarding a writ of mandamus against the Chicago, Milwaukee & St. Paul Railway Company.

The case arose on proceedings taken by the Railroad and Warehouse Commission of the State of Minnesota, under an act of the legislature of that State, approved March 7, 1887, General Laws of 1887, c. 10, entitled "An act to regulate common carriers, and creating the Railroad and Warehouse Commission of the State of Minnesota, and defining the duties of such commission in relation to common carriers." . . . . .

The ninth section of that act creates a commission to be known as the "Railroad and Warehouse Commission of the State of Minnesota," to consist of three persons to be appointed by the governor by and with the advice and consent of the senate.

The first section of the act declares that its provisions shall apply to any common carrier "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement, for a carriage or shipment from one place or station to another, both being within the State of Minnesota."

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The eighth section provides that every common carrier subject to the provisions of the act shall print and keep for public inspection schedules of the charges which it has established for the transportation of property; that it shall make no change therein except after ten days' public notice, plainly stating the changes proposed to be made, and the time when they will go into effect; that it shall be unlawful for it to charge or receive any greater or less compensation than that so established and published, for transporting property; that it shall file copies of its schedules with the com-

mission, and shall notify such commission of all changes proposed to be made; that in case the commission shall find at any time that any part of the tariffs of charges so filed and published is in any respect unequal or unreasonable, it shall have the power, and it is authorized and directed, to compel any common carrier to change the same and adopt such charge as the commission "shall declare to be equal and reasonable," to which end the commission shall, in writing, inform such carrier in what respect such tariff of charges is unequal and unreasonable, and shall recommend what tariff shall be substituted therefor; that in case the carrier shall neglect for ten days after such notice to adopt such tariff of charges as the commission recommends, it shall be the duty of the latter to immediately publish such tariff as it has declared to be equal and reasonable, and cause it to be posted at all the regular stations on the line of such carrier in Minnesota, and it shall be unlawful thereafter for the carrier to charge a higher or lower rate than that so fixed and published by the commission; and that, if any carrier subject to the provisions of the act shall neglect to publish or file its schedules of charges, or to carry out such recommendation made and published by the commission, it shall be subject to a writ of mandamus "to be issued by any judge of the Supreme Court or of any of the District Courts" of the State, on application of the commission, to compel compliance with the requirements of section 8 and with the recommendation of the commission, and a failure to comply with the requirements of the mandamus shall be punishable as and for contempt, and the commission may apply also to any such judge for an injunction against the carrier from receiving or transporting property or passengers within the State until it shall have complied with the requirements of section 8 and with the recommendation of the commission, and for any wilful violation or failure to comply with such requirements or such recommendation of the commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs and after due deliberation thereon, as may be just.

On the 22d of June, 1887, The Boards-of-Trade Union of Farmington, Northfield, Faribault and Owatonna, in Minnesota, filed with the commission a petition in writing, complaining that the Chicago, Milwaukee & St. Paul Railway Company, being a common carrier engaged in the transportation of property wholly by railroad, for carriage or shipment from Owatonna, Faribault, Dundas, Northfield and Farmington, to the cities of St. Paul and Minne-

apolis, all of those places being within the State of Minnesota, made charges for its services in the transportation of milk from said Owatonna, Faribault, Dundas, Northfield and Farmington to St. Paul and Minneapolis, which were unequal and unreasonable, in that it charged four cents per gallon for the transportation of milk from Owatonna to St. Paul and Minneapolis, and three cents per gallon from Faribault, Dundas, Northfield and Farmington, to the said cities; and that such charges were unreasonably high, and subject the traffic in milk between said points to unreasonable prejudice and disadvantage. The prayer of the petition was that such rates be declared unreasonable, and the carrier be compelled to change the same and adopt such rates and charges as the commission should declare to be equal and reasonable.

A statement of the complaint thus made was forwarded by the commission, on the 29th of June, 1887, to the railway company, and it was called upon by the commission, on the 6th of July, 1887, to satisfy the complaint or answer it in writing at the office of the commission in St. Paul, on the 13th of July, 1887.

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On the 13th of July, 1887, at the office of the commission in St. Paul, the company appeared by J. A. Chandler, its duly authorized attorney, and The Boards-of-Trade Union by its attorney, and the commission proceeded to investigate the complaint. An investigation of the rates charged by the company for its services in transporting milk from Owatonna, Faribault, Dundas, Northfield and Farmington, to St. Paul and Minneapolis, was made by the commission, and it found that the charges of the company for transporting milk from Owatonna and Faribault to St. Paul and Minneapolis were three cents per gallon in ten-gallon cans; that such charges were unequal and unreasonable; and that the company's tariff of rates for transporting milk from Owatonna and Faribault to those cities, filed and published by it as provided by chapter 10 of the Laws of 1887, was unequal and unreasonable; and the commission declared that a rate of 2½ cents per gallon in ten-gallon cans was an equal and reasonable rate for such services.

On the 4th of August, 1887, the commission made a report in writing which included the findings of fact upon which its conclusions were based, its recommendation as to the tariff which should be substituted for the tariff so found to be unequal and unreasonable, and also a specification of the rates and charges which it declared to be equal and reasonable. . . . . .

This report was entered of record, and a copy furnished to The

Boards-of-Trade Union, and a copy was also delivered, on the 4th of August, 1887, to the company, with a notice to it to desist from charging or receiving such unequal and unreasonable rates for such services. The commission thus informed the company in writing in what respect such tariff of rates and charges was unequal and unreasonable, and recommended to it in writing what tariff should be substituted therefore, to-wit, the tariff so found equal and reasonable by the commission.

The company neglected and refused, for more than ten days after such notice, to substitute or adopt such tariff of charges as was recommended by the commission. The latter thereupon published the tariff of charges which it had declared to be equal and reasonable, and caused it to be posted at the station of the company in Faribault on the 14th of October, 1887, and at all the regular stations on the line of the company in Minnesota prior to November 12, 1887, and in all things complied with the statute.

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On the 6th of December, 1887, the commission, by the attorney general of the State, made an application to the Supreme Court of the State for a writ of mandamus to compel the company to comply with the recommendation made to it by the commission, to change its tariff of rates on milk from Owatonna and Faribault to St. Paul and Minneapolis, and to adopt the rates declared by the commission to be equal and reasonable. . . . . .

Thereupon, an alternative writ of mandamus was issued by the court, returnable before it on the 14th of December, 1887.

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The case came on for hearing upon the alternative writ and the return, and the company applied for a reference to take testimony on the issue raised by the allegations in the application for the writ and the return thereto, as to whether the rate fixed by the commission was reasonable, fair and just. The court denied the application for a reference, and rendered judgment in favor of the relator and that a peremptory writ of mandamus issue. An application for a reargument was made and denied. The terms of the peremptory writ were directed to be, that the company comply with the requirements of the recommendation and order made by the commission on the 4th of August, 1887, and change its tariff of rates and charges for the transportation of milk from Owatonna and Faribault to St. Paul and Minneapolis, and substitute therefor the tariff recommended, published and posted by the commission, to-wit, the rate of 2½ cents per gallon of milk in ten-

gallon cans from Owatonna and Faribault to St. Paul and Minneapolis, being the rates published by the commission and declared to be equal and reasonable therefor. Costs were also adjudged against the company. To review this judgment, the company brought a writ of error.

Mr. Justice BLATCHFORD, after stating the case as above reported, delivered the opinion of the court.

The opinion of the Supreme Court of Minnesota is reported in 38 Minnesota, 281. In it the court in the first place construed the statute on the question as to whether the court itself had jurisdiction to entertain the proceeding, and held that it had. Of course, we cannot review this decision.

It next proceeded to consider the question as to the nature and extent of the powers granted to the commission by the statute in the matter of fixing the rates of charges. On that subject it said: "It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the act) should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and, therefore, in contemplation of law, the only ones that are equal and reasonable; and, hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force."

It then proceeded to examine the question of the validity of the act under the constitution of Minnesota, as to whether the legislature was authorized to confer upon the commission the powers given to the latter by the statute. It held that, as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive.

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The construction put upon the statute by the Supreme Court of

Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be reexamined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonble charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the staute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

. . . . . No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

. . . . . .

The issuing of the peremptory writ of mandamus in this case was, therefore, unlawful, because in violation of the Constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the Supreme Court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court.

In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review; and

The judgment of this court is, that the judgment of the Supreme Court of Minnesota, entered May 4, 1888, awarding a peremptory writ of mandamus in this case, be reversed, and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court.

See Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, which would seem to hold that a rate fixed in accordance with the law by an administrative authority after a hearing, provided by law, of the parties interested is final and conclusive, except where it is so low as to result in the confiscation of the property concerned.

HEALTH DEPARTMENT OF NEW YORK V. TRINITY CHURCH, &c.

Court of Appeals of New York. February, 1895

145 N. Y. 32.

Appeal from order of the General Term of the Court of Common Pleas for the city and county of New York, made January 4, 1892, which sustained exceptions taken by defendant to a verdict in favor of plaintiff directed by the court and granted a new trial.

. . . . . .

PECKHAM, J. The recovery in this case is founded upon that portion of the Consolidation Act which requires that all houses of a certain description, upon direction of the board of health, shall be supplied with Croton or other water in sufficient quantity at one or more places on each floor, occupied, or intended to be occupied, by one or more families. The defendant, among other things, alleges as a defense that the order of the board of health directing the defendant to furnish the water as provided by the statute was made without notice to it, and that, as it could not be complied with excepting by the expenditure of a considerable sum of money, the result would be to deprive the defendant of its property without a hearing and an opportunity to show what defense it might have, and that in fact it deprived defendant of its property without due process of law. There was no arrangement in either of these houses in question for the supplying of the Croton or other water to the occupants of each floor at the time when the order of the board of health was made; such order could not, therefore, be complied with on the part of the defendant without the expenditure of money for that purpose. That fact must be assumed, and even upon that assumption we do not think the act is invalid on the alleged ground that it deprives the defendant, if enforced, of its property without due process of law. The act must be sustained, if at all, as an exercise of the police power of the state. It has

frequently been said that it is difficult to give any exact definition which shall properly limit and describe such power. It must be exercised subject to the provisions of both the federal and state constitutions, and the law passed in the exercise of such power must tend in a degree that is perceptible and clear toward the preservation of the lives, the health, the morals and the welfare of the community, as those words have been used and construed in many cases heretofore decided. Numerous cases have arisen in this state where the power of the legislature was questioned, and where the exercise of that power was affirmed or denied for the reasons given therein.

. . . . . .

The act must tend in some appreciable and clear way towards the accomplishment of some one of the purposes which the legislature has the right to accomplish under the exercise of the police power. It must not be exercised ostensibly in favor of the promotion of some such object while really it is an evasion thereof and for a distinct and totally different purpose, and the courts will not be prevented from looking at the true character of the act, as developed by its provisions, by any statement in the act itself or in its title showing that it was ostensibly passed for some object within the police power. The court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and it must see that the latter do tend in some plain and appreciable manner towards the accomplishment of some of the objects for which the legislature may use this power.

First. Assuming that this act is a proper exercise of the power in its general features we do not think it can be regarded as invalid because of the fact that it will cost money to comply with the order of the board for which the owner is to receive no compensation or because the board is entitled to make the order under the provisions of the act without notice to and a hearing of the defendant. As to the latter objection it may be said that in enacting what shall be done by the citizen for the purpose of promoting the public health and safety it is not usually necessary to the validity of legislation upon that subject that he shall be heard before he is bound to comply with the direction of the legislature. *People ex rel Copcutt* v. *Board of Health*, 140 N. Y. 1, 6. The legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public safety or health without providing that the parties who are to be affected by those laws shall

first be heard before they shall take effect in any particular case. So far as this objection of want of notice is concerned the case is not materially altered in principle from what it would have been if the legislature had enacted a general law that all owners of tenement houses should, within a certain period named in the act, furnish the water as directed. Indeed, this act does contain such a provision, but the plaintiff has not proceeded under it. If in such case the enforcement of the direct command of the legislature were not to be preceded by any hearing on the part of any owner of a tenement house, no provision of the state or federal constitution would be violated. The fact that the legislature has chosen to delegate a certain portion of its powers to the board of health, and to enact that the owners of certain tenement houses should be compelled to furnish this water after the board of health had so directed, would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. I have never understood that it was necessary that any notice should be given under such circumstances before a provision of this nature could be carried out.

As to the other objections, no one would contend that the amount of the expenditure which an act of this kind may cause, whether with or without a hearing, is within the absolute discretion of the legislature. It cannot be claimed that it would have the right, even under the exercise of the police power, to command the doing of some act by the owner of the property and for the purpose of carrying out some provision of law, which act could only be performed by the expenditure of a large and unreasonable amount of money on the part of the owner. If such excessive demand were made the act would without doubt violate the constitutional rights of the individual. The exaction must not alone be reasonable when compared with the amount of the work or the character of the improvement demanded. The improvement or work must in itself be a reasonable, proper and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand on the individual for the benefit of the public. Of this the courts must, within proper limits, be the judges.

. . . . . .

Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria,* or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. Dillon on Mun. Corp. (4th Ed.) sec. 141 and note 2; *Com.* v. *Alger,* 7 Cush. 83, 84, 86; *Baker* v. *City of Boston,* 12 Pick. 184, 193; *Clark* v. *Mayor of Syracuse,* 13 Barb. 32, 36. The state, or its agent in enforcing its mandate, takes no property of the citizen when it simply directs the making of these improvements. As a result thereof the individual is put to some expense in complying with the law, by paying mechanics and other laborers to do that which the law enjoins upon the owner, but so long as the amount exacted is limited as stated, the property of the citizen has not been taken in any constitutional sense without due process of law.

Instances are numerous of the passage of laws which entail expense on the part of those who must comply with them and where such expense must be borne by them without any hearing or compensation because of the provisions of the law. *Thorpe* v. *R. R. Co.,* 27 Vt. 140-152.

. . . . . .

The citizen cannot, under this act, be punished in any way, nor can any penalty be recovered from him for an alleged non-compliance with any of its provisions or with any order of the board of health without a trial. The punishment or penalties provided for in section 665 cannot be enforced without a trial under due process of law, and upon such a trial he has an opportunity to show whatever facts would constitute a defense to the charge; to show, in other words, that he did not violate the statute or the order of the board or that the statute itself or the order was unreasonable and illegal. He might show that the house in question was not a tenement house within the provision of the act, or that there was a supply of water as provided for by the act, or any other fact which would show that he had not been guilty of an offense with regard to the act. *City of Salem* v. *R. R. Co.,* 98 Mass., 431, 447.

The mere fact, however, that the law cannot be enforced without causing expense to the citizen who comes within its provisions furnishes no constitutional obstacle to such enforcement even without previous notice to and a hearing of the citizen. What is the

propriety of a hearing and what would be its purpose? His property is not taken without due process of law, within any constitutional sense, when the enforced compliance with certain provisions of the statute may result in some reasonable expense to himself. Any defense which he may have is available upon any attempt to punish him or to enforce the provisions of the law.

. . . . . .

We do not think that the cost of making the improvements called for by this act exceeds the limits which have been defined, assuming the amount thereof which the defendant offered to prove.

. . . . . .

. . . . . We are, therefore, of the opinion that the act, if otherwise valid, is not open to the objection that it violates either the federal or state constitution in the way of depriving the defendant of its property without due process of law.

Second. We think that the act is valid as an exercise of the police power with respect to the public health and also with respect to the public safety regarding fires and their extinguishment. We cannot say as a legal proposition that it tends only to the convenience of the tenants in regard to their use of water. We cannot say that it has no fair, and plain, and direct tendency towards the promotion of the public health or towards the more speedy extinguishment of fires in crowded tenement houses. . . .

The learned counsel for the defendant asks where this kind of legislation is to stop. Would it be contended that the owners of such houses could be compelled to furnish each room with a bath tub and all the appliances that are to be found in a modern and well-appointed hotel? Is there to be a bath room and water-closet to each room and every closet to be a model of the very latest improvement? To which I should answer, certainly not. That would be so clearly unreasonable that no court in my belief could be found which would uphold such legislation, and it seems to me equally clear that no legislature could be found that would enact it. . . . . We feel that we ought to inspect with very great care any law in regard to tenement houses in New York and to hesitate before declaring any such law invalid so long as it seems to tend plainly in the direction we have spoken of and to be reasonable in its provisions. If we can see that the object of this law is without doubt the promotion or the protection of the health of the inmates of these houses or the preservation of the houses themselves and consequently much other property from loss or destruction by fire, and if the act can be enforced at a reasonable cost to

the owner, then in our opinion it ought to be sustained. We believe this statute fulfills these conditions. We think that in this case it is not a mere matter of convenience of the tenants as to where they shall obtain their supply of water. Simple convenience we admit would not authorize the passage of this kind of legislation. But where it is obvious that without the convenience of an appliance for the supply of water on the various floors of these tenement houses, there will be scarcely any but the most limited and scanty use of the water itself, which must be carried from the yards below, and when we must admit that the free use of water tends directly and immediately towards the sustaining of the health of the individual and the prevention of disease arising from filth either in the person or in the surrounding habitation, then we must conclude that it is more than a mere matter of convenience in the use of water which is involved in the decision of this case. The absence of the water tends directly towards the breeding of disease, and its presence is healthful and humanizing.

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Upon the whole we think the order of the General Term of the Court of Common Pleas should be reversed, and judgment directed to be entered upon the verdict ordered in the trial court, with costs.

BARTLETT, J. (dissenting).

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3. Unrestrained Discretion.

WILSON V. EUREKA CITY.

Supreme Court of the United States. October, 1898.

173 United States, 32.

Section 12 of ordinance Number 10 of Eureka City, Utah, provided as follows:

"No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councillor. A violation of this section shall, on conviction, subject the offender to a fine of not to exceed twenty-five dollars."

The plaintiff in error was tried for a violation of the ordinance in the justice's court of the city. He was convicted and sentenced to pay a fine of twenty-five dollars. He appealed to the district court of the first judicial district of the Territory of Utah.

On the admission of Utah into the Union the case was transferred to the fifth district court of Juab County, and there tried on the 24th of October, 1896, by the court without a jury, by consent of the parties.

Section 12, *supra*, was offered and admitted in evidence. Plaintiff in error objected to it on the ground that it was repugnant to section 1 of article 14 of the Constitution of the United States, in that it delegated an authority to the mayor of the city, or in his absence to a councillor.

There was also introduced in evidence an ordinance establishing fire limits within the city, providing that no wooden buildings should be erected within such limits except by the permission of the committee on building, and providing further for the alteration and repair of wooden buildings already erected. . . . . .

The evidence showed that the plaintiff in error was the owner of a wooden building of the dimensions of twenty by sixteen feet, which was used as a dwelling house. It was constructed prior to the enactment of the ordinances above mentioned. The evidence further showed that plaintiff in error applied to the mayor for permission to move the building along and across Main street in the city, to another place within the fire limits. The mayor refused the permission, stating that if the desire was to move it outside of the fire limits permission would be granted. Notwithstanding the refusal, the plaintiff in error moved the building, using blocks and tackle and rollers, and in doing so occupied the time between eleven A. M. and three P. M. At the place where the building stood originally the street was fifty feet from the houses on one side to those on the other—part of the space being occupied by sidewalks, and the balance by the traveling highway. The distance of removal was two hundred and six feet long and across Main street. Eureka City was and is a mining town, and had and has a population of about two thousand. It was admitted that the building was moved with reasonable diligence.

The plaintiff in error was again convicted. From the judgment of conviction he appealed to the Supreme Court of the State, which court affirmed the judgment, and to the judgment of affirmance this writ of error is directed.

Eureka City has no special charter, but was incorporated under

the general incorporation act of March 8, 1888, and among the powers conferred by it on city councils are the following:

"10. To regulate the use of streets, alleys, avenues, sidewalks, crosswalks, parks and public grounds.

"11. To prevent and remove obstructions and encroachments upon the same."

The error assigned is that the ordinance is repugnant to the Fourteenth Amendment of the Constitution of the United States, because "thereby the citizen is deprived of his property without due process of law," and "the citizen is thereby denied the equal protection of the law."

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

Whether the provisions of the charter enabled the council to delegate any power to the mayor is not within our competency to decide. That is necessarily a state question, and we are confined to a consideration of whether the power conferred does or does not violate the Constitution of the United States.

It is contended that it does, because the ordinance commits the rights of the plaintiff in error to the unrestrained discretion of a single individual, and thereby, it is claimed, removes them from the domain of law. To support the contention the following cases are cited: *Matter of Frazee,* 63 Michigan, 396; *State ex rel. Garrabad* v. *Dering,* 84 Wisconsin, 585; *Anderson* v. *Wellington,* 40 Kansas, 173; *Baltimore* v. *Radecke,* 49 Maryland, 217; *Chicago* v. *Trotter,* 136 Illinois, 430.

With the exception of *Baltimore* v. *Radecke,* these cases passed on the validity of city ordinances prohibiting persons parading streets with banners, musical instruments, etc., without first obtaining permission of the mayor or common council or police department. Funeral and military processions were excepted, although in some respects they were subjected to regulation. This discrimination was made the basis of the decision in *State ex rel. Garrabad* v. *Dering,* but the other cases seem to have proceeded upon the principle that the right of persons to assemble and parade was a well-established and inherent right, which could be regulated but not prohibited or made dependent upon any officer or officers, and that its regulation must be by well-defined conditions.

This view has not been entertained by other courts or has not been extended to other instances of administration. The cases were reviewed by Mr. Justice McFarland of the Supreme Court of California in *In re Flaherty,* 105 California, 558, in which an

ordinance which prohibited the beating of drums on the streets of one of the towns of that State "without special permit in writing so to do first had and obtained from the president of the board of trustees," was passed on and sustained. Summarizing the cases the learned justice said:

"Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and aldermen (*Pedrick* v. *Bailey*, 12 Gray, 161); forbidding orations, harangues, etc., in a park without the prior consent of the park commissioners (*Commonwealth* v. *Abrahams*, 156 Mass. 57), or upon the common or other grounds, except by the permission of the city government and committee (*Commonwealth* v. *Davis*, 140 Mass. 485); 'beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village,' on any street or sidewalk (*Vance* v. *Hadfield*, 22 N. Y. 588, 1003; 4 N. Y. Supp. 112); giving the right to manufacturers and others to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate (*Sawyer* v. *Davis*, 136 Mass. 239; 49 Amer. Rep. 27); prohibiting the erecting or repairing of a wooden building without the permission of the board of aldermen (*Hine* v. *The City of New Haven*, 40 Conn. 478); authorizing harbor masters to station vessels and to assign to each its place (*Vanderbilt* v. *Adams*, 7 Cow. 349); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall Market (*Nightingale, petitioner*, 11 Pick. 168); forbidding the keeping of swine without a permit in writing from the board of health (*Quincy* v. *Kennard*, 151 Mass. 563); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (*Commissioners, &c.*, v. *Covey*, 74 Md. 262); forbidding any person from remaining within the limits of the market more than twenty minutes unless permitted so to do by the superintendent or his deputy (*Commonwealth* v. *Brooks*, 109 Mass. 355)."

In all of these cases the discretion upon which the right depended was not that of a single individual. It was not in all of the cases cited by plaintiff in error, nor was their principle based on that. It was based on the necessity of the regulation of rights by uniform and general laws—a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor, and the cases, therefore, are authority against the contention of plaintiff in error. Besides, it is opposed by *Davis* v. *Massachusetts*, 167 U. S. 43.

Davis was convicted of violating an ordinance of the city of Boston by making a public address on the "Common," without obtaining a permit from the mayor. The conviction was sustained by the Supreme Judicial Court of the Commonwealth, 162 Mass. 510, and then brought here for review.

The ordinance was objected to, as that in the case at bar is objected to, because it was "in conflict with the Constitution of the United States, and the first section of the Fourteenth Amendment thereof." The ordinance was sustained.

It follows from these views that the judgment of the Supreme Court of Utah should be and it is

Affirmed.

THE ILLINOIS STATE BOARD OF DENTAL EXAMINERS V. THE PEOPLE EX REL. JOHN M. COOPER.

Supreme Court of Illinois. September, 1887.

123 Illinois, 227.

Mr. Justice MAGRUDER delivered the opinion of the Court:

This is a petition for *mandamus*, in which the relator prays that the Illinois State Board of Dental Examiners may be commanded to issue to him a license to practice dentistry and dental surgery in the State of Illinois.

The statute, under which the petition is filed, and which defines the powers and prescribes the duties of the State Board of Dental Examiners, is "An act to insure the better education of practitioners of dental surgery and to regulate the practice of dentistry in the State of Illinois," approved May 30, 1881, in force July 1, 1881. (Hurd's Rev. Stat. 1885, chap. 91, p. 816.) The sixth section of this act is as follows: "Any and all persons, who shall so desire, may appear before said board at any of its regular meetings and be examined with reference to their knowledge and skill in dental surgery, and if the examination of any such person or persons shall prove satisfactory to said board, the board of examiners shall issue to such persons as they shall find from such examination to possess the requisite qualifications, a license to practice dentistry in accordance with the provisions of this act. But said board shall, at all times, issue a license to any regular graduate of any *reputable* dental college without examination, upon the pay-

ment of such graduate, to the said board, of a fee of one dollar. All licenses issued by said board shall be signed by the members thereof, and be attested by its president and secretary; and such license shall be *prima facie* evidence of the right of the holder to practice dentistry in the State of Illinois." The first section of the act provides, "that it shall be unlawful for any person, who is not at the time of the passage of this act engaged in the practice of dentistry in this State, to commence such practice, unless such person shall have received a diploma from the faculty of some *reputable* dental college duly authorized by the laws of this State, or of some other of the United States, or by the laws of some foreign country, in which college or colleges there was at the time of the issue of such diploma, annually delivered a full course of lectures and instruction in dental surgery," etc.

In *The People ex rel. Sheppard* v. *State Board of Dental Examiners,* 110 Ill. 180, we held that the act did not specifically define what was a reputable college, and that it was left to the discretion and judgment of the board to determine what was a reputable college. In that case the *mandamus* was refused on the general ground that the writ will not lie to compel the performance of acts or duties, which necessarily call for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required.

But if a discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. They will interfere, where it is clearly shown that the discretion is abused. Such abuse of discretion will be controlled by *mandamus.* A public officer or inferior tribunal may be guilty of so gross an abuse of discretion or such an evasion of positive duty, as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law; in such a case *mandamus* will afford a remedy. Tapping on Mandamus, 66 and 19; Wood on Mandamus, 64; *Com'rs of the Poor* v. *Lynah,* 2 McCord (S. C.), 170; *The People* v. *Perry,* 13 Barb. 206; *Arberry* v. *Beavers,* 6 Texas, 457.

In *Village of Glencoe* v. *The People,* 78 Ill. 382, we said: "The discretion vested in the council can not be exercised arbitrarily for the gratification of feelings of malevolence, or for the attainment of merely personal and selfish ends. It must be exercised for the public good, and should be controlled by judgment and not by passion or prejudice. When a discretion is abused and made to work injustice, it is admissible that it shall be controlled by *mandamus.*"

In the present case the demurrer admits all the allegations of the petition to be true. It will be necessary to examine those allegations to see if they show any abuse of discretion on the part of the board, or any unjust exercise of the discretionary power vested in it.

The petition alleges that the relator complied with the requirement of the statute and with the rule of the board adopted in September, 1884.

. . . . . .

On November 4, 1884, the relator matriculated as a student in the Chicago College of Dental Surgery, with which four of the five members of the appellant board are alleged to be connected as instructors or members of the faculty, and pursued his studies there during a period of not less than five months in 1884 and 1885. During the summer and fall of 1885 he received practical instruction in dentistry and dental surgery. On November 2, 1885, he matriculated as a student in the Northwestern College of Dental Surgery, which gives such lectures and instructions as are required by the above rule, and attended therein as a student during one course of instruction of not less than five months in the years 1885 and 1886. A diploma was issued to him by the last named college on April 3, 1886. On May 11, 1886, he presented this diploma to the State Board of Dental Examiners, at a regular meeting thereof, and tendered his fee of one dollar, and demanded a license. The board has refused to issue the license.

The petition avers that the board so refused to give him a license through malice, because he left the Chicago college, in which four members of the board are interested, and graduated at the Northwestern college. It also avers that the two colleges are rivals for the patronage of students, that the board is under the control of the Chicago college and determined to break down the Northwestern college, and that the refusal to issue the license springs from a determination to protect their own college from competition.

If these averments are true, the members of the State board are abusing their discretion and making an unjust use of it. They have a right to decide whether the college, at which an applicant for license has graduated, is reputable or not. But they must decide that question upon just and fair principles. The discretion with which they are vested was conferred upon them in the interest of the public and to protect the people from unskilled and uneducated practitioners of dentistry. If four of the five members, which compose the board, are instructors in a particular college,

and if they are making use of their power under the State law to build up their own institution and crush out its rival, they are acting from motives of self-interest and not in the interests of the public. It can not be tolerated that licenses should be withheld for any such unworthy reasons. Inasmuch as the board has elected to stand by the overruled demurrer to the petition, we are bound to assume that the statements of the petition are true.

Again, the relator says in his petition that, after his application on May 11, 1886, he wrote on May 25 to the secretary of the board and inquired why a license was not issued to him. On May 26 the secretary wrote in reply, returning the one dollar, and saying: "The matter of issuing a license on your diploma from the Northwestern College of Dental Surgery was referred to the National Association of Dental Examiners, which will meet in August. Until their decision I can not issue any license." It appears that the association here referred to is composed, for the most part, of men living outside of this State, and that its meeting "in August" was to take place in the State of New York.

When a regular graduate of a dental college applies to the board of examiners for a license, the only question for them to determine is whether the college, at which the applicant graduated, is reputable or not. The law clothes them, and no other body, with the power to decide this question. They can not delegate their discretionary power to an organization beyond the limits of the State. By the letter of the secretary the board declined to perform the duty imposed upon it by the Illinois statute, and announced its intention of referring the question of issuing a license to a foreign association.

After this announcement, upon being threatened with a *mandamus* proceeding, the board, in an official communication signed by its secretary, promised the relator's attorney that, if he would wait a reasonable time, it would call a meeting and would issue to the relator the license which he demanded. The meeting was held on June 25, 1886, but the license was refused. When the board promised to issue a license, it must have been of the opinion that the relator was entitled to it, and they could not have considered him entitled to it unless they regarded the college at which he had graduated as reputable.

It is claimed by counsel for appellee that the board, by adopting the above rule, has exercised its discretion in determining what is a reputable dental college; that any college, which insists upon such requisites for graduation as the rule prescribes, must be recog-

nized by the board as a reputable college, and that, as the Northwestern college has brought itself within the requirements of the rule, the board has no discretion about admitting its graduates. On the other hand, counsel for appellant insists that, while no colleges which fail to comply with the rule will be regarded as reputable, yet the board would have a right to demand other requisites than those specified in the rule before deciding a college to be reputable.

We are not prepared to hold that a dental college, which requires a preliminary examination before admitting students to matriculation, and which requires students before graduation to attend upon two full regular courses of lectures and practical instructions, each to be of not less than five months' duration and to be held in separate years with practical instructions intervening between the courses, may not in other respects lack some of the elements which make such an institution reputable. "Reputable," according to Webster's definition, means "worthy of repute or distinction," "held in esteem," "honorable," "praiseworthy." A college might have examinations and lectures and instructions of such an inferior character and under the direction of such inferior instructors, that it would be unworthy of praise and undeserving of esteem.

But the petition in this case alleges that the Northwestern college has been recognized by the board of examiners as a reputable dental college and was so recognized when the relator presented his diploma.

As the board did not refuse to grant the license on the ground that the Northwestern college was not reputable, but refused such license on other grounds as stated in the petition, it will be presumed that the members regarded that college as reputable. They had no discretion as to any other matter than the character of the college issuing the diploma, as to its being reputable or not reputable. When that matter was decided and out of the way, their judicial or discretionary power was exhausted. The duty to issue the license was then a mere ministerial one, and its performance could be enforced by *mandamus*.

We think that the allegations of the petition, considered as a whole, warranted the issuance of the writ of *mandamus*.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

YICK WO V. HOPKINS.

WO LEE V. HOPKINS.

Supreme Court of the United States. October, 1885.

118 United States, 356.

These two cases were argued as one and depended upon precisely the same state of facts; the first coming here upon a writ of error to the Supreme Court of the State of California, the second on appeal from the Circuit Court of the United States for that district.

The plaintiff in error, Yick Wo, on August 24, 1885, petitioned the Supreme Court of California for a writ of *habeas corpus*, alleging that he was illegally deprived of his personal liberty by the defendant as sheriff of the city and county of San Francisco.

The sheriff made return to the writ that he held the petitioner in custody by virtue of a sentence of the Police Judges Court, No. 2, of the city and county of San Francisco, whereby he was found guilty of a violation of certain ordinances of the board of supervisors of that county, and adjudged to pay a fine of $10, and, in default of payment, be imprisoned in the county jail at the rate of one day for each dollar of fine until said fine should be satisfied, and a commitment in consequence of non-payment of said fine.

The ordinances for the violation of which he had been found guilty were set out as follows:

Order No. 1569, passed May 26, 1880, prescribing the kind of buildings in which laundries may be located.

"The people of the city and county of San Francisco do ordain as follows:

Sec. 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

"Sec. 2. It shall be unlawful for any person to erect, build, or maintain, or cause to be erected, built, or maintained, over or upon the roof of any building now erected or which may hereafter be erected within the limits of said city and county, any scaffolding, without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said

scaffolding is to be erected and used, and such scaffolding shall not be used for any other purpose than that designated in such permit.

"Sec. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment."

Order No. 1587, passed July 28, 1880, the following section:

"Sec. 68. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone."

The following facts were also admitted on the record: That petitioner is a native of China and came to California in 1861, and is still a subject of the Emperor of China; that he has been engaged in the laundry business in the same premises and building for twenty-two years last past; that he had a license from the board of fire wardens, dated March 3, 1884, from which it appeared "that the above described premises have been inspected by the board of fire wardens, and upon such inspection said board found all proper arrangements for carrying on the business; that the stoves, washing and drying apparatus, and the appliances for heating smoothing irons are in good condition, and that their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1617, defining 'the fire limits of the city and county of San Francisco and making regulations concerning the erection and use of buildings in said city and county,' and of order No. 1670, 'prohibiting the kindling, maintenance, and use of open fires in houses;' that he had a certificate from the health officer that the same premises had been inspected by him, and that he found that they were properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry, without injury to the sanitary condition of the neighborhood, had been complied with; that the city license of the petitioner was in force and expired October 1st, 1885; and that the petitioner applied to the board of supervisors, June 1st, 1885, for consent of said board to maintain and carry on his laundry, but that said board, on July 1st, 1885, refused said consent." It is also admitted to be true, as alleged in the petition, that, on February 24, 1880, "there were

about 320 laundries in the city and county of San Francisco, of which about 240 were owned and conducted by subjects of China, and of the whole number, viz., 320, about 310 were constructed of wood, the same material that constitutes nine-tenths of the houses in the city of San Francisco. The capital thus invested by the subjects of China was not less than two hundred thousand dollars, and they paid annually for rent, license, taxes, gas, and water about one hundred and eighty thousand dollars."

It was alleged in the petition, that "your petitioner and more than one hundred and fifty of his countrymen have been arrested upon the charge of carrying on business without having such special consent, while those who are not subjects of China, and who are conducting eighty odd laundries under similar conditions, are left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The business of your petitioner, and of those of his countrymen similarly situated, is greatly impaired, and in many cases practically ruined by this system of oppression to one kind of man and favoritism to all others."

The statement therein contained as to the arrest, &c., was admitted to be true, with the qualification only, that the eighty odd laundries referred to are in wooden buildings without scaffolds on the roofs.

It was also admitted "that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted."

By section 2 of article XI of the Constitution of California it is provided that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

By section 74 of the Act of April 19, 1856, usually known as the consolidation act, the board of supervisors is empowered, among other things, "to provide by regulation for the prevention and summary removal of nuisances to public health, the prevention of contagious diseases; . . . . . to prohibit the erection of wooden buildings within any fixed limits where the streets shall have been established and graded; . . . . . to regulate the sale, storage, and use of gunpowder or other explosive or combusti-

ble materials and substances, and make all needful regulations for protection against fire; to make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants."

The Supreme Court of California, in the opinion pronouncing the judgment in this case, said: . . . . . "We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the Constitution of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by the cases of *Barbier* v. *Connolly,* 113 U. S. 27, and *Soon Hing* v. *Crowley,* 113 U. S. 703." The writ was accordingly discharged and the prisoner remanded.

In the other case, the appellant, Wo Lee, petitioned for his discharge from an alleged illegal imprisonment, upon a state of facts shown upon the record, precisely similar to that in the case of Yick Wo. . . . . .

But, in deference to the decision of the Supreme Court of California in the case of Yick Wo, and contrary to his own opinion as thus expressed, the circuit judge discharged the writ and remanded the prisoner.

Mr. Justice MATTHEWS delivered the opinion of the court.

In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the Constitution and laws of the State, is not open to us. . . . . .

That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of

each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion upon consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of this business, apply for redress by the judicial process of *mandamus*, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

This erroneous view of the ordinances in question led the Supreme Court of California into the further error of holding that they were justified by the decisions of this court in the cases of *Barbier* v. *Connolly*, 113 U. S. 27, and *Soon Hing* v. *Crowley*, 113 U. S. 703. In both of these cases the ordinance involved was simply a prohibition to carry on the washing and ironing of clothes in public laundries and washhouses, within certain prescribed limits of the city and county of San Francisco, from ten o'clock at night until six o'clock in the morning of the following day. . . . . .

The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleas-

ure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. By the third article of the treaty between this government and that of China, concluded November 17, 1880, 22 Stat. 827, it is stipulated: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by § 1977 of the Revised Statutes, that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

. . . . . A similar question, very pertinent to the one in the present cases, was decided by the Court of Appeals of Maryland, in the case of the *City of Baltimore* v. *Radecke*, 49 Maryland 217. In that case the defendant had erected and used a steam engine, in the prosecution of his business as a carpenter and box-maker in

the city of Baltimore, under a permit from the mayor and city council, which contained a condition that the engine was "to be removed after six months' notice to that effect from the mayor." After such notice and refusal to conform to it, a suit was instituted to recover the penalty provided by the ordinance, to restrain the prosecution of which a bill in equity was filed. The court, holding the opinion that "there may be a case in which an ordinance, passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority," it proceeds to speak, with regard to the ordinance in question, in relation to the use of steam engines, as follows: "It does not profess to prescribe *regulations* for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore, to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no *rules* by which its *impartial execution* can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being brought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact,

an ordinance which clothes a single individual with such power hardly falls within the *domain of law,* and we are constrained to pronounce it inoperative and void."

This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York,* 92 U. S. 259; *Chy Lung* v. *Freeman,* 92 U. S. 275; *Ex parte Virginia,* 100 U. S. 339; *Neal* v. *Delaware,* 103 U. S. 370; and *Soon Hing* v. *Crowley,* 113 U. S. 703.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are per-

mitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. To this end,

The judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit Court of the United States for the District of California in the case of Wo Lee, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.

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4. Construction of Powers.

PEOPLE V. N. Y., L. E. & W. R. R. CO.

New York Court of Appeals. January, 1887.

104 New York 58.

DANFORTH, J. Upon motion on notice by the attorney-general for a mandamus requiring the defendant to construct and maintain on the line of its road at the village of Hamburgh, a building of sufficient capacity to accommodate its passengers arriving at that place, or departing therefrom, or in waiting to depart, and such freight as is usually received at or shipped from that point, it appeared that the village of New Hamburgh contains twelve hundred inhabitants and furnishes to the defendant at a station established by it, a large freight and passenger business; that its depot building is entirely inadequate for these purposes, and the absence of a depot building and warehouse sufficient for the accommodation of passengers and freight has been and continues to be a matter of serious damage to large numbers of persons doing business at that station. These facts were conceded by the defendant. It also appeared that upon complaint made to the railroad commissioners after notice to the defendant, that body adjudged and recom-

mended that the railroad company should construct a suitable building at that station within a time named, but although informed of this determination, the defendant failed to comply or do anything towards complying with it, not for want of means or ability to do so, but because "its directors decided that the interests of the defendant required it to postpone, for the present, the erection or enlargement of the station house or depot at the village of Hamburgh."

The Supreme Court at Special Term granted the motion, and, adopting the language of the railroad commissioners, ordered that the defendant "forthwith construct and maintain a suitable depot building, of sufficient size and capacity to accommodate passengers arriving and departing on said road at the village of Hamburgh, as well as such passengers as may be in waiting on ordinary occasions to depart from the said village, on the line and by the way of said defendant's road, and of sufficient capacity to accommodate such quantities of freight as are usually received at said village, or that may be shipped therefrom, by the way of said New York, Lake Erie and Western Railroad." Upon appeal to the General Term the order, after very careful consideration, was affirmed. The railroad company appeals.

We agree with the court below that at common law the defendant, as a carrier, is under no obligation to provide warehouses for freight offered, or depots for passengers waiting transportation. But that court has found such duty to be imposed by statute. To this we are unable to assent. The question arises upon the construction of the General Railroad Act (Laws of 1850, chap. 140), and its amendments. . . . . .

The court below does not find, nor does the respondent claim, that the legislature has at any time, in express and specific terms, imposed upon a railroad company the duty of erecting or maintaining a depot or warehouse. It is sought to be implied. The company is empowered to erect and maintain all necessary and convenient buildings, stations, etc., for the accommodation and use of their passengers, freight and business" (id. § 28, subd. 8), and may acquire and hold real estate and other property for these purposes, "as may be necessary to accomplish the object of its incorporation." There are some other provisions in the same direction; none go further than those cited. But from these, and from the circumstances first referred to, that the company is exercising a public trust, and to that cause owes its existence and capacity to enjoy and profit by the franchise it has accepted, it is argued by

the respondent that the right to construct a station, and its necessity, carries with it an obligation to do so in a proper manner. In regard to the facts there is no dispute. A plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public.

The railroad commissioners have thought that it was essential for those purposes that a new and enlarged building for passengers and freight should be erected. That it is true, was a question for them to decide. The statute (Laws of 1882, chap. 353), created a commission of "competent persons," required from them an official constitutional oath, assigned to them an office for the transaction of business, provided a clerk to administer oaths to witnesses and a marshall to summon them, gave full power of investigation and supervision of all railroads and their condition with reference not only to the security, but accommodation of the public, and declared that whenever, in their judgment, it shall appear, among other things, that any addition to, or change of the stations or station-houses is necessary to promote the security, convenience or accommodation of the public, they shall give notice to the corporation of the improvements and changes which they deem to be proper, and if they are not made, they shall present the facts to the attorney-general for his consideration and action, and also to the legislature. All these things have been done. The commissioners have heard and decided. They can do no more. After so much preliminary action by a body wisely organized to exercise useful and beneficial functions, it might well be thought unfortunate that some additional machinery had not been provided to carry into effect their decision. By creating, the statute recognizes the necessity for, such a tribunal to adjust conflicting interests and controversies between the people and the corporation. It has clothed it with judicial powers to hear and determine, upon notice, questions arising between these parties, but there it stops. Its proceedings and determinations, however characterized, amount to nothing more than an inquest for information. We find no law by which a court can carry into effect the decision. At this point the law fails, not only by its incompleteness and omission to furnish a remedy, but by its express provision that no request or advice of the board, "nor any investigation or report made by" it, shall have the effect to impair the legal rights of any railroad corporation. The attorney-general is given no new power. He may consider the result of the investigation made by the commissioners, and their decision, and so may the company, but we must look further for his right of action, and

the corporation, disregarding the judgment of the commissioners, may continue the management of its business in its own way, may determine, in its own discretion, to what extent and in what manner, the exercise of a public trust requires it to subserve the "security, convenience and accommodation of the public."

It may say, as in this case, the accommodations we furnish are not sufficient, they are not suitable, the omission to furnish different and better entails injury upon the public, but we will give no better, nor make alterations until we choose. The railroad commissioners are powerless, and as the law now stands, neither the attorney-general of the State nor its courts can make their order effectual.

Cases are cited by the respondent in support of a different contention. Some of them turn upon statutory provisions, as do those arising in Connecticut, where the law makes an order of the commissioners effectual by authorizing its enforcement (*State* v. *N. H. & N. R. R. Co.*, 37 Conn. 153). Under our statutes the public gain nothing in any legal sense from the determination of the commissioners. It is not enforceable as a judgment; it is not even a command; if it affects the railroad company at all, it is as advice merely. It can compel them only through the interposition of the legislature, who may indeed make it effectual by action upon their report, or by some general law, if it be deemed expedient, giving force and efficacy to their determinations.

In the next place, as the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus. It cannot compel the erection of a station-house, nor the enlargement of one. The power of the company to provide such buildings is, under the statutes, a permissive one only. If the corporation choose to exercise it, it may. The statute does not exact it. It specifies certain things which the company shall not do. It specifies many things which it shall do. . . . . The statute is peremptory as to many matters, but it nowhere says that for its intending passengers, or waiting freights, cover by building of any kind shall be provided. As to that the statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage "its affairs," among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to

its own interest. With the exercise of that discretion the legislature only can interfere. . . . . .

. . . . . The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character. Nor can it by any fair or reasonable construction be implied. The whole subject of the relation between the company and its passengers and freightors appears to have been in contemplation of the legislature. Certain acts towards them as we have seen are made imperative as duties (§ 36); others, and among them the erection of stations and buildings, are made possible by permission (§ 28, subd. 8). We cannot disregard this difference in language, and give by implication to one phrase the same force and meaning which the legislature has by cxpress terms conveyed in the other. We are constrained, therefore, to hold that the appeal must succeed.

The order appealed from should be reversed and the motion denied, with costs.

All concur, RAPALLO, J., in result.

Ordered accordingly.

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5. *Conclusiveness of Administrative Determinations.*

HILTON V. MERRITT.

Supreme Court of the United States. January, 1884.

110 United States 97.

This was a suit brought by the plaintiffs in error, who were plaintiffs in the Circuit Court, to recover the sum of $1,037.40, an alleged excess of duties exacted by the defendant as collector of customs at the port of New York, on two cases of kid gloves imported by plaintiffs from Paris, France, in the steamer Mosel, in June, 1878.

Mr. Justice WOODS delivered the opinion of the court.

It appears from the bill of exceptions found in the record that the withdrawal entry of the packages on which the duty occasion-

ing this controversy arose, was made October 23d, 1878. The local appraiser made and reported to the collector his appraisement of the goods. The importers being dissatisfied therewith, demanded a reappraisment according to law, which was allowed, and a merchant appraiser appointed to be associated with one of the general appraisers.

The merchant appraiser made an appraisement of the standard gloves at 42 francs per dozen, and of the invoice at 16,613.10 francs, which corresponded with the importer's invoice and entered valuation of the merchandise in question.

The general appraiser made a report of his appraisement on the same day, in which he put the value of the standard gloves at 52 francs, and the total valuation at 20,282.85 francs.

Upon receiving these and other appraisements, the collector wrote to the general appraiser a letter. . . . . .

To this letter the general appraiser replied, by letter of the same date, stating, among other things, as follows:

"As to the invoices under consideration I do not feel at liberty to formally withdraw the reports I have already presented, because they were found on the evidence received on the reappraisements, and I think it best that they should stand as expressing my convictions based on that evidence. If, however, you are willing to retain them as memoranda for that purpose, and will accept as substitutes therefor the additional reports which I present herewith and have designated as 'amended' reports, I shall feel that I have met, to the best of my ability, the considerations which your letter set forth."

The amended report of the general appraiser fixed the value of the merchandise in question in this case at 49 francs

The collector, on October 23d, 1878, assessed the duty, 50 per cent. *ad valorem,* on the merchandise, based on the valuation of the standard glove at 49 francs, adopting the appraisement returned in the amended report of the general appraiser, that being an advance of the invoice value of 16.2 per cent., and imposed an additional duty of 20 per cent. *ad valorem* on account of undervaluation in the entry.

The importers, the plaintiffs in error, duly protested against the action of the collector and, under protest, paid the duties assessed and appealed to the Secretary of the Treasury, who, on November 11th, 1878, approved the decision of the collector, holding, however, that the correctness of the valuation was not a matter subject to appeal.

Upon the trial of the case the plaintiffs offered in evidence the records of the proceedings before the merchant appraiser and the general appraiser, including the testimony and various documents before those officers, and subsequently before the collector. They also offered the testimony of one Hildreth, an expert, and others, to show the foreign market value of gloves at the principal markets of France, whence the merchandise in question was imported. They also offered the testimony of the collector to show all the facts within his knowledge, or officially acted upon by him, in relation to the invoice in question, and to show what his experience was in valuing kid gloves. They also offered to prove the cost of the manufacture of goods similar to those in question. All the evidence so offered was excluded by the court, and the plaintiffs excepted.

The question presented by the exceptions of plaintiffs is whether the valuation of merchandise made by the customs officers under the statutes of the United States for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, or is such valuation reviewable in an action at law brought by the importer to recover back duties paid under protest.

The solution of this question depends upon the provisions of the acts of Congress regulating the subject. . . . .

The provisions of the statute law show with what care Congress has provided for the fair appraisal of imported merchandise subject to duty, and they show also the intention of Congress to make the appraisal final and conclusive. When the value of the merchandise is ascertained by the officers appointed by law, and the statutory provisions for appeal have been exhausted, the statute declares that the "appraisement thus determined shall be final and deemd to be the true value, and the duties shall be levied thereon accordingly." This language would seem to leave no room for doubt or construction.

The contention of the appellants is, that after the appraisal of merchandise has been made by the assistant appraiser, and has been reviewed by the general appraiser, and a protest has been entered against his action by the importer, and the collector has appointed a special tribunal, consisting of a general and merchant appraiser, to fix the value, and they have reported each a different valuation to the collector, who has decided between them and fixed the valuation upon which the duties were to be laid, that in every such case the importer is entitled to contest still further the appraisement

and have it reviewed by a jury in an action at law to recover back the duties paid. After Congress has declared that the appraisement of the customs officers should be final for the purpose of levying duties, the right of the importer to take the verdict of a jury upon the correctness of the appraisement should be declared in clear and explicit terms. So far from this being the case, we do not find that Congress has given the right at all. . . . . .

The appellants contend, however, that the right to review the appraisement of the customs officers by a jury trial is given to the importer by sections 2931 and 3011 of the Revised Statutes. . . . . .

The argument is that by these sections the appraisement which had been declared final by section 2930 is opened for review by a jury trial. Such is not, in our opinion, a fair construction of this legislation. . . . . .

Congress has said that the valuation of the customs officers shall be final, but there is still a field left for the operation of the sections on which the plaintiffs in error rely. Questions relating to the classification of imports, and consequently to the rate and amount of duty, are open to review in an action at law. This construction gives effect to both provisions of the law. If we yield to the contention and construction of plaintiffs in error, we must strike from the statute the clause which renders the valuation of dutiable merchandise final.

We are of opinion, therefore, that the valuation made by the customs officers was not open to question in an action at law as long as the officers acted without fraud and within the power conferred on them by the statute. The evidence offered by the plaintiffs, and ruled out by the court, tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were assuming powers not conferred by the statute, and the questions which the plaintiffs proposed to submit to the jury were, in the view we take of the statute, immaterial and irrelevant.

We find no error in the record. The judgmentof the Circuit Court must, therefore, be

Affirmed.

BELL V. PIERCE.

Court of Appeals of New York. May, 1872.

51 N. Y. 12.

. . . . . .

About the 20th of June, 1864, plaintiff's family went to the house in West Seneca, and remained there, as in previous years, for about three months, and then returned to the house in Buffalo; and during the summer season, plaintiff was with his family in West Seneca, or at his house in Buffalo, substantially as is above stated to have been his habit in previous years. Defendants had no knowledge, before the delivery of the assessment roll to the supervisors of the town, that the plaintiff had or claimed to have any residence except in West Seneca, although they knew that he had been residing during that year in Buffalo, and that his family had come to West Seneca only a few weeks previous to July 1, 1864. They gave the statutory notices of the completion of the assessment roll, and of their meeting to correct the same, and no one appeared before them to object to the regularity of the plaintiff's assessment. Plaintiff was not assessed for personal property in the city of Buffalo in the year 1864. Upon trial at circuit, the court directed a verdict for the plaintiff, subject to the opinion of the court at General Term. A verdict was rendered accordingly.

The conclusions of law at General Term were as follows:

That the defendants, as assessors as aforesaid, had jurisdiction to determine whether the plaintiff was taxable in said town of West Seneca, for personal property at the time. . . . . .

HUNT, C. If the general term was right in holding that the defendants, as assessors, had jurisdiction to determine whether the plaintiff was an inhabitant of West Seneca, taxable for personal property in that town, its judgment was correct. If in error on that point, its judgment was wrong. In *Barhyte* v. *Shepard*, this court held that the assessors had jurisdiction to determine whether the plaintiff's property was entitled to exemption for the reason that he was a clergyman. 35 N. Y. 238. In *Chegary* v. *Jenkins*, this court held that the assessors had jurisdiction to determine whether the property sought to be exempt as a seminary of learning was entitled to that exemption. 5 N. Y. 376. . . . . .

In each of these cases the assessors had jurisdiction of the person

alleged to be taxable, and of the property on which the assessment was sought to be imposed. Barhyte, for example, was a resident of the town of Spencer. In that town were located both the real and personal estate, respecting which the question arose. He was undoubtedly a taxable inhabitant, that is, one of a class liable to taxation under proper circumstances. So was Madame Chegary a taxable inhabitant of New York. The persons being taxable inhabitants, and the property in each case being before the assessors, it was their duty to decide whether it came within the exemption provided by law. The parties making complaint themselves submitted that very question to the assessors. It was their duty to decide it as they understood the law to be. In *Mygatt* v. *Washburn*, 15 N. Y. 316, on the other hand, the assessors had no jurisdiction of the person of the plaintiff. He was not a taxable inhabitant, that is, he was not liable to taxation for personal property in the town of Oxford, under any circumstances. The assessors, therefore, had no power to adjudicate upon the question of his taxability, and when they undertook to do so their action was void, and did not protect them from liability.

Under the Revised Statutes the rule is as follows, viz.: "Every person shall be assessed in the town or ward where he resides, when the assessment is made, for all the personal estate owned by him." 1 R. S. 390, sec. 5. But one assessment can be made upon an individual for personal estate, and that must be in the town or ward where he resides when the assessment is made. In the year 1850 (Laws 1850, chap. 92, p. 142), it was enacted, "that in case any person possessed of such personal estate shall reside during any year in which taxes may be levied, in two or more counties, towns or wards, his residence, for the purposes and within the meaning of this section (sec. 5, *supra*), shall be deemed and held to be in the town, county or ward in which his principal business shall have been transacted." 1 R. S., Edm. ed. 362.

A new test to determine the fact of residence, which was before unknown, was created by this law. By the fact as ascertained in this mode, to wit, the place of business, was the liability to taxation determined. The statute assumes that a man may have more than one place of residence at the same time. The liability to taxation for personal property is fixed by the residence on the first day of July in each year. *Mygatt* v. *Washburn, supra.* No person can be assessed as a taxable inhabitant of Seneca unless on that day he was a resident of that town. On that day the plaintiff had, with his family, occupied his own house in that town for ten days. His

family remained there for three months continuously, the plaintiff taking a portion of his meals there every day and spending there five or six nights of each week. He attended daily to his business in Buffalo, taking a portion of his meals at his house there, sleeping there one or two nights of each week, his wife occasionally taking meals at the house with him. The plaintiff, upon this state of facts, was no doubt a voter in Buffalo, and was there liable to military and jury duty. He was a resident of Buffalo, having his domicile in that city. The cases show also that he was at the same time a resident of West Seneca. To establish a residence requires a less permanent abode than to give a domicile, or even to create an inhabitance. *Harvard* v. *Gore,* 5 Pick. 379; *Guire* v. *O'Daniel,* 1 Binny 349: *Haggart* v. *Morgan,* 1 Seld. 422.

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The books are full of cases defining residence and non-residence under the statutes, subjecting non-residents to arrest and their property to attachment. It would be difficult to reconcile these cases. I do not find any well considered cases where the question has arisen upon the statute providing for the taxation of personal property, other than those I have referred to. I conclude, therefore, that the plaintiff, on the first day of July, 1864, was, for the purpose of taxation, a resident of the town of West Seneca. Being a resident of that town, and having personal property liable to taxation, the assessors had jurisdiction to include that property in the assessment roll of that town. The case comes within the principle of *Barhyte* v. *Shepard* (*supra*), and not within that of *Mygatt* v. *Washburn,* where the assessors had no jurisdiction of the person of the plaintiff, and no right to take any action on the subject. Where the principal business of the plaintiff was transacted was a matter of fact, to be ascertained by proof and to be settled by judicial determination. This determination was to be made by the assessors. It was to be made upon proof presented, or, if none was presented, by the best means of knowledge possessed by them. They are not liable for an erroneous decision of a question which they had jurisdiction to decide.

The judgment should be affirmed with costs.

EARL, C. (dissenting).

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METROPOLITAN BOARD OF HEALTH V. HEISTER.
(Four Cases.)

Court of Appeals of New York. March, 1868.

37 N. Y. 661.

HUNT, Ch. J.

. . . . . .

It is further objected that the act violates the second section of the first article of the State Constitution, which declares that "the trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever," and the sixth section of the same article, which provides that "no person shall be deprived of life, liberty or proprty without due process of law." The argument on this point has been conducted by Mr. Heister's counsel, chiefly upon the allegation that on the question of nuisance or no nuisance the party complained of had a right to the opinion of a jury, before his right could be finally disposed of. It was admitted on the argument by the additional counsel that a court of equity could give final judgment without calling in a jury. It will be observed that in each of the cases now before us, it was alleged and decided that the proceeding was "dangerous to the public health." This was in addition to the charge that it was a nuisance.

No one has been deprived of his property or of his liberty by the proceedings in question. The commissioners have provided that cattle shall not be driven upon certain streets except at certain hours of the day. They have also provided that the business of slaughtering cattle shall not be carried on in the city of New York south of a designated line. These regulations take away no man's property. If Mr. Heister owns cattle his ownership is not interfered with. He may sell, exchange and traffic in the same manner as any other person owning cattle may do. If he owns a slaughter-house his property remains intact. He may sell it, mortgage it, devise it or give it away, and may use it just as any other man or all other men in the State combined may do. Simply the health regulations of the district operate upon his cattle and his slaughter-house in the same manner that they do upon like property owned by all others, and the use of the streets for dangerous purposes or the prosecution of a business dangerous to the public health is regulated by the ordinance in question. This practice is not forbidden by the Constitution, and has been recognized from the or-

ganization of the State government, and is to be found in nearly every city or village charter which has been granted by the legislature.

Nor, in my judgment, is there any greater plausibility in the argument that the act violates the right of trial by jury. The Constitution recognized the fact that there were classes of cases which had not been and need not be tried by a jury.

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I hold it to be clear that in questions relating to the public health, where the public interests required action to be taken, a jury had not been the ordinary tribunal to determine such questions prior to the adoption of the Constitution of 1846.

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These acts show that from the earliest organization of the government, the absolute control over persons and property, so far as the public health was concerned, was vested in boards or officers, who exercised a summary jurisdiction over the subject, and who were not bound to wait the slow course of the law, and that juries had never been used in this class of cases. The governor, the mayor, health officers under various names, were the persons entrusted with the execution of this important public function; and they were always empowered to act in a summary manner. Scarcely a year passes or did pass prior to 1846, in which the legislature did not charter some city or village, and give to the local powers full authority, by their own action and in their own way, to regulate, abate or remove all trades or manufactures that might be by them deemed injurious to the public health. I have examined the statutes from 1832 onward, and find that scarcely a year passed in which these powers were not given to many cities or villages by orignal authority or by amendments to their charters. I see, among the laws of the session just closed, several of the same character among them, one to incorporate the village of Gouverneur, which gives the trustees full power to prohibit and abate nuisances, to compel the owners of a butcher's stall, sewer, privy or other unwholesome thing, to cleanse the same or cause the same to be removed, or otherwise disposed of, as may be necessary for the public good. See also 15 Wend. 262.

I do not doubt, either, that, upon general principles of law, and considering them as nuisances, the right of regulating the use of the streets by droves of cattle, and of removing houses for their slaughter from particular locations, as the public health required, was within the power of the common council or other local authori-

ties, independently of the statute by which it was given. *Van Wormer* v. *Albany*, 15 Wend. 262; 3 Black. Com. b. It would be difficult then, to say that the power given by this act of 1866, was a new exercise of authority, not allowed by the Constitution, or that it was a case in which a jury trial had heretofore been had.

Before leaving the consideration of this constitutional objection, it ought, perhaps, to be observed that the act provides for notice to the party affected, before the judgment finally passes against him. In substance, the board, upon the evidence before it, determine that a *prima facie* case exists requiring their action. In the present instance, after such preliminary determination made, notice was given to Heister of what had been done, and that he could be heard upon the subject, with his witnesses at a time designated. This gave the same protection to all his rights as if notice had been served upon him before any preliminary proceedings had been taken. He refuses to litigate before the board the question whether his pursuit is dangerous to the public health, but places himself upon their want of power over the subject. He cannot complain now, that their judgment upon the facts is to be held conclusive upon him.

It is further insisted that the act in question is invalid, in that it confers judicial power upon the metropolitan board of health.

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These arguments are earnestly pressed, and when the case occurs where they necessarily arise, will be carefully considered and decided. In my opinion they do not now arise.

The power to be exercised by this board upon the subjects in question is not judicial in its character. It falls more properly under the head of an administrative duty. It is no more judicial than the action of commissioners of highways in laying out or refusing to lay out a highway, or in determining the necessity of rebuilding a bridge in their town. It is no more judicial than is the action of commissioners of excise in the country, or of the metropolitan police board, who, as commissioners of excise, discuss the question of whether a license shall be granted to an individual to keep an inn or to sell spirituous liquors. The qualifications of the person are scanned, the place proposed for the sale of liquors, and whether the applicant has the accommodations required by law, the public necessity or propriety of such permission to sell, are examined into and determined. But such powers have never been held to be of a judicial character. The power of the metropolitan board to act upon the latter subject has been dis-

tinctly sustained in this court. *Metropolitan Board* v. *Barre*, 34 N. Y. 657.

The judgment of the General Term in each case should be reversed and judgment ordered for the appellants. . . . . .

WOODRUFF, MASON, BACON, and DWIGHT, JJ., concurred.

MILLER, J. (dissenting.)

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RAYMOND V. FISH.

Supreme Court of Connecticut. September, 1883.

51 Conn. 80.

Action to recover damages for the removal of brush with oysters growing upon it, from Pequonoek River, in the town of Groton; brought to the Superior Court in New London county. The defendants justified the acts complained of as done under an order of the board of health of the town, alleging that the brush was, and had been condemned as, a nuisance, and that they did nothing that it was not necessary to do to remove the nuisance.

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Upon these facts the case was reserved for the advice of this court.

PARK, C. J. The question in this case turns upon the construction to be given to the first and second sections of the statute with regard to public health and safety, (Gen. Statutes, p. 258,) which provides as follows: "The justice of the peace and selectmen in each town shall constitute a board of health, and have all the power necessary and proper for preserving the public health and preventing the spread of malignant diseases therein, and may appoint its president and such health officers or health committee as it may deem expedient, and delegate to them any of its powers; and the members present at any meeting convened as the board shall direct, shall be a quorum for business. . . . . Such board, or such health officers or health committee, shall examine into all nuisances and sources of filth injurious to the public health, and cause to be removed all filth found within the town which in their judgment shall endanger the health of the inhabitants; and all expenses for such removal shall be paid by the person who placed it there, if

known, and, if not known, by the town; and when any such filth or nuisance shall be found on private property, such board shall notify the owner or occupant of such property to remove the same at his expense, within such time as the board shall direct, and if he shall neglect to remove it he shall be fined not less than twenty dollars nor exceeding one hundred dollars and pay such expense and costs as the town shall incur by such removal; and after the expiration of such time such board shall cause such filth or nuisance forthwith to be removed or abated; and such board, or such health officer or committee as it shall direct, may enter all places where such board shall have direct cause to suspect any such nuisance or causes of filth to exist."

In the month of May, 1881, the small village of Pequonock in the town of Groton was sorely afflicted with the contagious diseases of scarlet fever and diphtheria of a malignant character.

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The attention of the board of health of the town of Groton was called to the subject, meetings were held by the board, and examinations were made of Pequonock River, and various other places in the vicinity of the village, to discover the cause of the malady.

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The board of health were unable, from their examinations of the river and other places, to determine with certainty what caused the malady, and thereupon requested the assistance of the State board of health. Their secretary made an examination of the river, and afterwards reported to the town board that the brush in the river with oysters thereon were a nuisance. The town board afterwards on the 10th of August, 1881, had another hearing regarding the matter, at which the plaintiff and others appeared, and were fully heard. At this meeting the board passed the following vote: "That we concur with the state board in their recommendation that the brush be removed as a nuisance." Thereupon the board, by their secretary, gave the plaintiff and others written notice to remove the brush owned by them respectively from the river, specifying a time when they were to begin to do it. The brush was not removed, and on the 8th day of December following the board, with some new members who had been elected in October preceding, again declared by a vote that the brush in the river was a nuisance and injurious to the public health; and again ordered the plaintiff and others to remove the brush owned by them respectively before a specified day; and caused due notice to be given to

the owners of the action of the board. The plaintiff was not present at this meeting of the board. He had no notice that it was to be held, and had no knowledge of it till afterwards. The brush was not removed by the plaintiff, and the board, by the hands of the defendants, removed and destroyed it, with the oysters thereon, doing no unnecessary damage. The case finds that the board acted in good faith throughout the whole transaction.

The case further finds that "neither the brush, nor oysters, nor both combined, were the origin or producing cause of the diseases," but leaves it undetermined "whether they may not have furnished conditions favorable to the spread and continuance of the diseases, and to making them more malignant than they otherwise would have been."

The malady ceased to be epidemic about the first of September; and after that time, it is expressly found, that the brush and oysters were not a nuisance.

These are the principal facts of the case, and they make the liability of the defendants depend upon the construction to be given to the statute already cited. The question is, does the statute confer upon the board of health the right to determine conclusively in any case what are nuisances and sources of filth which endanger the health of the inhabitants; so that if they act in good faith, and merely err in judgment, the statute will justify the act done, although the property of a third party may be destroyed? If the statute is to be so construed, then the defendants are not responsible for the damage, whatever it may be, that they have caused the plaintiff. If it is not to be so construed,—if boards of health must act at their peril in cases of emergency,—then the defendants are liable, and must respond in damages for all the injury caused by their acts.

Before coming to this question directly, we should take into consideration the object of this statute, which professes to be enacted for the preservation of the "public health and safety." It is well known that diseases of the most contagious and malignant character are supposed to be caused by poisonous exhalations from decaying vegetable and animal matter. This statute is based upon that fact and was intended to furnish a remedy in cases where such diseases are spreading, and men, women, and children are stricken down and dying in consequence of noxious effluvia from decaying matter and filth in the vicinity. During such a delay an entire village might become depopulated. What shall be done? Life and health are to be considered on the one side, and what value

there may be in nuisance and filth on the other. Life and health are to be preserved at the cost of nuisances and filth. The statute does not mean to destroy property which is not in fact a nuisance, but who shall decide whether it is so? All legal investigations require time, and cannot be thought of. If the board of health are to decide at their peril, they will not decide at all. They have no greater interest in the matter than others, further than to do their duty; but duty, hampered by a liability for damages for errors committed in its discharge, would become a motive of very little power.

It would seem to be absolutely necessary to confer upon some constituted body the power to decide the matter conclusively, and to do it summarily, in order to accomplish the object the statute has in view. We think this has been done. We think the board of health of the town of Groton had the power to decide conclusively, in the apparent necessities of the case, that the brush in Pequonock river was a nuisance, endangering the life and health of the inhabitants of the village.

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The powers of the board in these respects cannot be questioned, for they are expressly conferred; and if they are exercised in good faith, and with proper care and prudence, in the manner prescribed by the statute, the board cannot be made responsible for mere errors of judgment, whatever may be the consequence. And we think a like construction must be given to the sections of the act in question in this suit, as we have already intimated. The statute commenced by declaring that the board of health "shall have all the powers necessary and proper for the preservation of the public health and the prevention of the spreading of malignant diseases." The second section commences by declaring that it shall be the duty of the board to "examine into all nuisances and sources of filth injurious to the public health, and cause to be removed all filth found within the town which in their judgment shall endanger the health of the inhabitants." Here power is expressly given to decide what constitutes filth, and if they merely err in judgment there can be no redress. This is conceded, but it is said that the statute makes a distinction between nuisances and filth. What distinction there can be in fact in respect to their baneful influence upon contagious and malignant diseases it is difficult to see. . . . . We see none, and clearly none exists. And further, by the common law, a private person has a right to abate a private nuisance that does him harm, without resort to the courts

for redress. But in such case he abates at his peril. He cannot justify the act done unless he proves that the supposed nuisance was one in fact. This is the doctrine the plaintiff insists should govern this case. But unless the statute goes farther than this, nothing was accomplished by its enactment, and neighborhoods afflicted with malignant diseases might as well have been left to their rights at the common law.

But it is said that any other construction of the act renders it unconstitutional, and for the reason that it takes away the right of trial by jury; that it deprives the owner of his property without due process of law; that it confers judicial powers upon a tribunal not warranted by the constitution, and that it takes private property for public use without compensation.

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. . . . . We cannot doubt the constitutionality of the act when rightly considered. It is nothing more nor less than a police regulation. The property was not taken for public use within the meaning of the constitution. It was destroyed for the protection of the public health.

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We think the act is constitutional.

We think there is nothing in the claim that the board that passed the vote declaring the brush a nuisance and injurious to the public health on the 8th of December, was a different board from the one that passed a similar vote on the 10th day of August of the same year, because it was composed of some new members who had been elected in the meantime. The board was the same, although all the members might be different. As well might it be claimed that the Superior Court changes as often as different judges preside.

The board being the same, it might well act in December upon what it had done in August preceding.

We further think that there was no error committed by the board in removing the brush in December, when it did not at that time endanger the life or health of the inhabitants. The board refrained from removing the brush in August, when the first vote of removal was passed, through fear that by so doing the poisonous effluvia would be greatly increased, and the malady which then prevailed would be aggravated in proportion. It became necessary, therefore, to remove the brush when it could be done in safety to the public health. Aud further, the brush was removed in December to prevent a recurrence of the malady the following sum-

mer. It was reasonable to suppose, if the brush, with the oysters upon it, had caused the contagion and malignant diseases that afflicted the village during the summer preceding, it would occasion like results the following summer. We think there was no error in this regard.

Complaint is made that the defendants destroyed the oysters as well as the brush. But the facts of the case furnish no foundation for this complaint. The court has found that the defendants did no unnecessary damage. This is equivalent to finding that the oysters were so attached to the brush that separation could not be made. We think there is nothing in this claim.

We advise judgment in favor of the defendants.

In this opinion the other justices concurred; except GRANGER, J., who dissented.

See United States v. Ju Toy, 198 U. S. 253, and Bates & Guild Co. v. Payne, 194 U. S. 107. This last case would seem to hold that even in the absence of a statute to that effect the determination of an administrative officer as to a matter within his jurisdiction is final certainly as to the facts and probably also as to a question of mixed law and fact, where he has not been guilty of an abuse of discretion. This principle is also enunciated in City of Salem v. Eastern R. R. Co., 98 Mass. 254, *infra*.

MYGATT V. WASHBURN.

Court of Appeals of New York. June, 1857.

15 N. Y. 316.

DENIO, C. J. The act relating to the assessment of taxes requires that every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him. I R. S. 389, sec. 5. As the plaintiff resided in Oxford, during a portion of the year of 1846, and changed his residence to Oswego while the proceedings to make out the assessment for that year were going on, it becomes necessary to ascertain when, in the course of these proceedings, the assessment shall be said to be made.

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. . . . . In my opinion the assessment should be considered as made at the expiration of the time limited for making the inquiry, namely, on the first day of July. If there is any change

of residence or in the ownership of the property, after that day, it does not affect the assessment roll. The inquiries are then completed. Any changes which the assessors are authorized to make after that time, are such as may be required to correct mistakes. No earlier day can be assumed, because what is done by one or all the assessors prior to the first of July is inchoate and preparatory, and liable to be altered according to their final judgment on the matter. When the statute speaks of the time "when the assessment is made" it refers to the binding and conclusive act which designates the tax payers and the amount of taxable property. If I am correct in what has been said, it follows that the time, referred to in the statute, is the first day of July. It cannot be an earlier or a later day without involving incongruities which we cannot suppose the legislature would have permitted to exist.

The plaintiff, therefore, was not subject to the jurisdiction of the assessors. In placing his name on the roll, and adding thereto an amount as the value of his personal property they acted without authority. As the board of supervisors was obliged by law to annex a tax to the name of every person assessed upon the roll, and to issue a warrant for the collection of the tax, the unauthorized act of the assessors was the means by which the property of the plaintiff was procured to be sold. They are, therefore, responsible to the plaintiff for the damages which ensued. It was not, in the view of the law, the case of an error of judgment. It is a salutary rule, though in some cases, and perhaps in the one before us, it may operate harshly, that a subordinate officer is bound to see that he acts within the scope of the authority legally committed to him. The principle is too well settled to require a reference to authority; but its application to the case of assessment of a person not liable to taxation in the town or district in which the assessment is made has often been declared in the courts of this and other states. *Suydam* v. *Keys,* 13 John. 444; *Prosser* v. *Secor,* 5 Barb. 607; *People* v. *The Supervisors of Chenango County, supra; Freeman* v. *Kenney,* 15 Pick. 44; *Lyman* v. *Fiske,* 17 id. 231.

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The judgment of the Supreme Court should be affirmed.

All the judges concurred in affirming the judgment, except SHANKLAND, J., who dissented.

Judgment affirmed.

See also American School of Magnetic Healing v. McAnnulty, 187 U. S. 94.

C. Enforcement of the Law.

1. Judicial Process.

BARCLAY V. COMMONWEALTH.

Supreme Court of Pennsylvania. 1855.

25 Penn. St. 503.

Woodward, J. After much consideration it was settled in *Taggart's Case,* 9 Harris 527, that, on conviction for a continuing nuisance, the defendant, besides being sentenced to fine and imprisonment, should be ordered also to abate the nuisance; and that if he failed to do so, a writ, founded on such a judgment, might issue to the sheriff, requiring *him* to abate the nuisance, at the costs of the defendant.

The court in this case entered no judgment against the defendant that the nuisance should be abated, but ordered the sheriff to abate it by removing the barn.

This was erroneous, not only because the defendant should have been sentenced, as in *Taggart's Case,* but because of the order for the removal of the barn. The defendant was acquitted on the first count, which charged the *barn* with being a nuisance, and was convicted only on the second count, wherein the erection of the barn is alleged by way of inducement to the offence, which is described as putting hay, straw and other products of the farm in said barn, and keeping horses, mules, cattle and other animals in and about said barn, and in the yard adjacent thereto, and feeding the said cattle, horses and other animals with the aforesaid hay, and straw and other products in said barn, and in the said yard near the aforesaid springs, &c. The offence laid in this count consisted in the *use* made of the barn and yard in close proximity to the springs, and the nuisance would be effectually abated by discontinuing such use. Where an erection or structure itself constiutes a nuisance, and where it is put up in a public street, its demolition or removal is necessary to the abatement of the nuisance; but where the offence consists in the wrongful use of a building, harmless of itself, the remedy is to stop such use, not to tear down or remove the building itself. The barn may be used for storing hay and grain without annoyance to the public, but for stabling and feeding cattle it cannot be. The public are entitled to pure waters from the springs in question, and must be protected in the enjoyment of

this right. The courts should take effectual measures to prevent the barn and yard from being used in the manner complained of, and to compel the defendant to put and keep them in such condition as will not corrupt the springs. If he fail to do so after being sentenced, the sheriff should be ordered to do it at his costs; and if necessary, the court can restrain further wrongdoing on the part of the defendant, by requiring him to find security to be of good behavior.

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The sentence is reversed and the record remanded to the Quarter sessions, with directions to proceed and sentence the defendant according to law.

CITY OF SALEM V. EASTERN RAILROAD COMPANY.

Supreme Judicial Court of Massachusetts. January, 1868.

98 Mass. 431.

Contract to recover twenty-three hundred and sixty-three dollars and eighty-six cents, with interest from the date of demand, expended by the plaintiffs in digging a canal for the purpose of abating a nuisance in the mill pond in Salem.

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WELLS, J. This action is brought under Gen. Sts., c. 26, sec. 10, against the defendants as the party who caused the nuisance complained of and alleged to have been removed. Several objections are made to the maintenance of the action.

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6. The most important and the most difficult question in the case relates to the effect of the orders of the board of health by which the existence of the nuisance was "found and determined;" and that it was created and maintained by the defendants; and which also directed its removal by the defendants.

The plaintiff's counsel contend that the proceedings of the board of health are *quasi* judicial; and that the determination and orders made in that capacity are adjudications conclusive against the defendants upon all the facts involved in those determinations. If this be so, the defendants are precluded from denying the existence and alleged cause of the nuisance, and their duty to remove it. . . . . .

But the court are of opinion that, in a suit to recover expenses incurred in removing a nuisance, when prosecuted against a party on the ground that he caused the same, but who was not heard, and had no opportunity to be heard, upon the questions before the board of health, such party is not concluded by the findings or adjudications of that board, and may contest all the facts upon which his liability is sought to be established. He is neither party nor privy to those adjudications; he has no right of appeal, and no other means by which to revise the proceedings or to correct errors, either by law or fact, therein. Parties similarly situated in respect to judgments in courts of law may impeach them collaterally.

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The law applicable to the judgments rendered upon default of parties who have not been duly served with process affords analogies which bear upon this question.

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Adjudications which stand merely as proceedings *in rem* cannot, as a general rule, be made the foundation of ulterior proceedings *in personam*, so as to conclude a party upon the facts involved. In most cases of suits which are in their nature proceedings *in rem*, and so designated, personal or public notice to parties interested is required to be given; and they are entitled to appear and be heard, and to have such rights in relation to the proceedings as are accorded to parties litigant. Against such parties, whether they have actually appeared or not, the adjudication is held to be conclusive upon the facts which are made the ground of the judgment; when those facts are again brought in question in ulterior or collateral proceedings. But such effect is due to the fact that they were so made parties to the proceedings. *The Mary*, 9 Cranch 126, 144; *Whitney* v. *Walsh*, 1 Cush. 29; *Scott* v. *Shearman*, 2 W. Bl. 977; *Hollingsworth* v. *Barbour*, 4 Pet. 466, 474.

When there appears to have been no notice to the parties to be affected, and no opportunity afforded them to be heard in defense of their rights, whatever operation the adjudication may have upon the *res*, and however conclusive it may be held for the protection of those who act, or derive rights under it, the adjudication itself can have no valid operation against parties who may be named in the proceedings. If it proceed to declare any obligation or impose any liability upon such parties, they may, in any subsequent suit to enforce it, deny the validity of the judgment, and controvert the facts upon which it was based. *Boswell's Lessee* v. *Otis*, 9 How.

336; *Harris* v. *Hardeman,* 14 How. 334; *McKee* v. *McKee,* 14 Penn. St. 231.

We think that these principles apply to the proceedings of a board of health. Their determination of questions of discretion and judgment in the discharge of their duties is undoubtedly in the nature of a judicial decision; and, within the scope of the power conferred, and for purposes for which the determination is required to be made, it is conclusive. It is not to be impeached or set aside for error or mistake of judgment; nor to be reviewed in the light of new or additional facts. The officer or board to whom such determination is confided, and all those employed to carry it into effect, or who may have occasion to act upon it, are protected by it, and may safely rely upon its validity for their defence. It is in this sense that such adjudications are often said to be conclusive against all the world; and they are so far as the *res* is concerned. The statute and the public exigency are sufficient to justify the omission of previous notice, hearing and appeal. But this exigency is met and satisfied by the removal of the nuisance. As a matter of police regulation, the proceedings and the authority of the board end here. When the city comes to seek its remedy over; to throw upon some individual supposed to have caused the nuisance, the expenses of removal which it has incurred in the first instance as the representative of the public; there seems to be no reason founded either in the public exigency or in the justice of the case that requires or warrants the holdings of such *ex parte* adjudications as final and conclusive to establish the facts upon which the claim rests.

It is said that this obligation is imposed upon the party by the express terms of the statute, as the direct and necessary consequence of the disregard of the order from the board of health. If this were so, we should be obliged to hold that no adjudication could be made in the premises, and no order issued, until the parties had been notified and heard in their defence. *Capel* v. *Child,* 2 Cr. & Jerv. 558; *Bonaker* v. *Evans,* 16 Q. B. 162. But we do not think that this is the effect of the statute. However it may be as to the penalty imposed upon the owner or occupant by sec. 8, it is clear that it cannot be so with the liability incurred under sec. 10. That liability is imposed upon a class which does not correspond with the one to which the order is required to be addressed. It differs by including any "other person who caused or permitted" the nuisance. No order is required to issue to such other person. And, if it should issue, it would be without authority of law. It

could have no other effect than as notice to the party. Actual notice from the board of health of the existence of the nuisance is all that such "other person" is entitled to receive. But notice of the existence of the nuisance does not put him in the position of a party to the proceedings from which the adjudication results; and even this notice was not required in the earlier statutes. Rev. Sts. c. 21, sec. 11.

The jurisdiction necessary to give validity to the judicial decrees which will be binding *in personam* is not acquired from the mere fact of the presence of the person within the territorial limits over which the tribunal may exercise jurisdiction. At common law, the actual presence of the party in court was required; and if he did not appear his presence was enforced by peremptory process. It is only by force of statutes that judgments may be entered upon default after service of process or notice upon the party. *Picquet* v. *Swan*, 5 Mason 35. Judgments are no more invalid when the defendant is beyond the reach of the process of the court, than when, being within the jurisdiction, no opportunity is afforded him to appear and defend his interests. It is well settled also that, where there is jurisdiction for a special purpose only, any attempt to exercise a general power will be void as to the excess. *Bates* v. *Delavan*, 5 Paige 299.

From the foregoing considerations we are led to construe the statutes in question as conferring no judicial power upon the board of health beyond that which is absolutely essential to the performance of their administrative functions for the accomplishment of the end contemplated, to wit, the summary abatement of nuisances of the class indicated. The absence of any provision for previous notice and hearing, the summary execution of the order without means of redress or relief by appeal or otherwise against error and injustice, would make the proceedings violate the fundamental principles of justice universally recognized, if they should be held to establish, by an unalterable and absolutely conclusive decree, the personal liability of the parties who might be named by the board of health as having caused or permitted the nuisance. We cannot yield to a construction which would lead to such results. By the narrower construction which we have indicated, the statute will have its full and effective operation as a police regulation, while parties who are charged with responsibility for the expenses incurred will not be deprived of that full opportunity of defense which is essential to the due administration of justice in whatever form of judicial proceedings it may be undertaken.

The record of proceedings of the board of health is competent evidence in the present case for some purposes. It proves the fact that such procedings were had, which is a necessary preliminary step. So far as the proceedings were within and in accordance with the authority and duties of the board, they are entitled to the presumption that whatever was done was rightly done; and may be held as *prima facie* evidence of the existence of a nuisance which warranted the board of health in taking action and incurring expense for its removal. But it is not evidence that the nuisance was caused by the defendants, in the manner stated, or in any manner; and all the facts, upon which it is sought to charge the defendant with liability, are open to be tried and determined by the proofs in the case.

The case will therefore stand for trial.

CITY OF TAUNTON V. TAYLOR.

Supreme Judicial Court of Massachusetts. November, 1874.

116 Massachusetts 254.

Bill in equity in the name of the city of Taunton, and signed by Daniel L. Mitchell as mayor thereof, filed August 20, 1872, and containing the following allegations:

That by an ordinance of said city it is provided that "two members of the board of mayor and aldermen, and three members of the common council, are hereby constituted a board of health of the city of Taunton, with all the powers vested in boards of health by the general laws of the Commonwealth;" and that two members of the board of aldermen, and three members of the common council, named in the bill, constituted the board of health of Taunton for this year:

That on August 15, 1872, an order was passed by said board of health, and recorded in the records of the city, as follows: "Ordered that the exercise of the trade or employment of preparing tripe, manufacturing neat's-foot oil, tallow and glue stock, and the boiling and trying of bones, hoofs, heads, refuse and partially decayed animal matter, and, as a part of such trade or employment, the storing about the premises where such business is carried on of putrid meats, bones, heads, legs and the various other ma-

terials from which offensive smells emanate, which are used in such trade or employment, be and the same hereby is forbidden within the limits of the city of Taunton:"

That the defendant was carrying on in Taunton the trade or employment prohibited in said order, and on August 17 was served with a notice in writing, signed by all the members of the board of health, of the passage of the order, and that it would be enforced if not complied with within seven days; that on August 28 said board of health passed another order, instructing the city marshal to visit the defendant's manufactory and take such means as were necessary to enforce the former order of the board; and that the defendant declined to comply with the order of the board, and threatened to resist with force every attempt to enforce it.

The bill prayed for a subpoena, and an injunction to the defendant, his servants, workmen and agents, commanding them to desist and refrain from exercising, within the limits of the city of Taunton, the trade or employment set forth in the order of the board of health. Upon the filing of the bill a temporary injunction was granted.

The answer of the defendant contained a demurrer to the bill, because it did not appear thereby that the plaintiff corporation was a party to the suit, or entitled to the relief prayed for, or had any right in equity to proceed against the defendant as set forth in the bill; and also the following allegations:

"That the bill is brought without the authority or direction of the city of Taunton, or of the city council thereof, or of any person or persons duly authorized to act for the city of Taunton or the city council thereof, and that Daniel L. Mitchell had no authority to institute these proceedings in equity against this defendant, either as mayor of said city of Taunton, or as the agent of said city of Taunton, or as an individual citizen thereof, and that his signature to the bill is made without authority in law or equity."

. . . . . .

That the order set forth in the bill was unreasonable, illegal and void; and that the board of health of the city of Taunton had no authority to pass or enact it.

That the defendant, believing and relying on the representations of the persons named that they were the legally appointed and constituted board of health of the city, did on September 12, 1872, appeal from said order, and applied to the Superior Court for a jury, which was duly empanelled, and on October 17, after a trial and a view of the premises, returned a verdict by which

they "decided that the order of the board of health should be altered as follows: That Mr. A. Taylor, having selected a suitable locality within the limits of the city of Taunton, shall confer with the board of health after having obtained in writing the unanimous consent of the residents within a radius of one-half a mile of the same;" and that the proceedings before the jury were null and void by reason of the verdict being unintelligible and plainly erroneous and beyond the authority of the jury, and by reason of the order of prohibition being unauthorized and void as before set forth.

That the trade or employment of preparing tripe, manufacturing neat's-foot oil, tallow and glue stock, and the boiling and trying of bones, hoofs and heads, were divers and distinct branches of business, and were none of them nuisances or hurtful to the inhabitants of the city of Taunton, or dangerous to the public health, or attended with noisome and injurious odors, or injurious to the estates of the citizens of Taunton, but contrariwise were necessary and useful branches of business; nor was the preparing of tripe or the manufacture of neat's-foot oil, tallow and glue stock, or the boiling and trying of bones, carried on by this defendant so as to be a nuisance, or hurtful, or dangerous, or injurious as above set forth.

The plaintiff filed a general replication. The parties afterwards agreed to submit the case to the court upon the bill and answer and a statement of facts. . . . . .

The verdict set out in the answer has been accepted by the Superior Court, and no further action has been taken by that court thereon.

It is further agreed that the rights of the parties, if they have any, to submit an issue of fact to a jury as to whether the business, as carried on by the defendant, was an offensive business within the meaning of the statute, are hereby waived, and that the parties expressly reserve all objections to the form of proceedings.

Gray, C. J. This is a bill in equity to restrain the exercise by the defendant of an offensive trade in violation of an order of the board of health of the city of Taunton. Various objections are made to the granting of the relief prayed for, but we are of opinion that none of them can be sustained.

1. By the Gen. Sts. c. 26, § 2, no different provision being made by law, the city council might appoint a joint committee of their body a board of health. . . . . .

2. By the same statute the board of health may forbid the exer-

cise, within the limits of the city, or in any particular locality thereof, of "any trade or employment which is a nuisance or hurtful to the inhabitants, or dangerous to the public health, or the exercise of which is attended by noisome and injurious odors, or is otherwise injurious to their estates." §§ 52, 60. Any such order of prohibition is to be served upon the occupant or person having charge of the premises where such trade or employment is exercised, and if he refuses or neglects for twenty-four hours to obey it, "the board shall take all necessary measures to prevent such exercise." § 55. Any person aggrieved by such order may appeal therefrom, and, upon application to the Superior Court, or a justice thereof in vacation, within three days from the service thereof, may obtain a warrant for a jury, to be empanelled as in the case of the laying out of highways. § 56. The order is to be obeyed pending the appeal. § 57. "The verdict of the jury, which may either alter the order, or affirm or annul it in full, shall be returned to the court for acceptance, as in case of highways; and said verdict, when accepted, shall have the authority and effect of an original order from which no appeal had been taken." § 58.

The authority of the legislature to confer powers of this character, for the protection of the public health and the suppression of nuisances, upon municipal boards or officers, is well settled. Such powers must be summarily exercised, in order to accomplish their object. To allow the offensive trade to be carried on until it had been decided by a jury to be a nuisance, and the questions of law arising upon such a trial had been determined by the court, would defeat the purpose of the statute. It is a case in which the private rights must be held subordinate to the public welfare, and falls within the strictest interpretation of the maxim, *Salus populi suprema lex.* The rights of any person to be affected by the order of prohibition are reasonably secured by requiring the order to be served upon him or the person in charge of his business, and by allowing him an appeal to a jury, to be empanelled immediately, without waiting for a regular term of court, and by whose verdict the order may be altered, annulled or affirmed. *Belcher* v. *Farrar* 8 Allen 325.

The determination of the board of health is not a merely ministerial act; but is *quasi* judicial, in the sense that it is not to be contested or revised, except in the manner provided in the statute. The allegation in the defendant's answer, that the trade which he carried on was not a nuisance, therefore, stated no defence which could have availed him at any stage of this cause.

The case of *Salem* v. *Eastern Railroad,* 98 Mass. 431, differed from this in being a suit to recover the expenses of removing a nuisance in accordance with a special order under the Gen. Sts. c. 26, §§ 8-10, respecting which the defendant had had no opportunity to be heard, either before the board of health or on appeal; and the decision allowing the defendant to contest the facts found by the order was based upon that distinction.

3. But an order of the board of health, under the Gen. Sts. c. 26, § 52, is not in the nature of an adjudication of a particular case, but of a general regulation of the trade or employment mentioned therein. It is not to be construed with technical strictness, but with the same liberality as all votes and proceedings of municipal bodies or officers who are not presumed to be versed in the forms of law; and every reasonable presumption is to be made in its favor. *Commonwealth* v. *Patch,* 97 Mass. 221. It need not state in direct terms that the trade which it prohibits is a nuisance. It is sufficient if the order clearly shows that in the opinion of the board of health the exercise of such trade will be hurtful to the inhabitants, or injurious to the public health, or be attended by noisome and injurious odors.

The trade or employment described in the order of prohibition now before us is a single trade or employment, which includes not only "preparing tripe, manufacturing neat's-foot oil, tallow and glue stock, and the boiling and trying of bones, hoofs, heads, refuse and partially decayed animal matter," but also, "as a part of such trade or employment, the storing about the premises where such business is carried on of putrid meats, bones, heads, legs and the various other materials from which offensive smells emanate, which are used in such trade or employment." The very terms of this description sufficiently manifest and declare the opinion of the board of health that the trade or employment in question is, to say the least, attended by noisome and injurious odors. The order was therefore a valid exercise of the power conferred upon the board of health by the statute.

4. The verdict of the jury in this case did not annul the order of the board of health, or affect it otherwise than by permitting the defendant, after selecting a suitable locality, and obtaining the consent in writing of all those residing within half a mile thereof, to confer with the board of health. It is not pretended that he has obtained such consent of those residing in the neighborhood of his works; and if he had, the verdict merely permitted him to apply anew to the board of health. If the defendant was dissatisfied

with the verdict, his remedy was by application to the Superior Court to set it aside, and, if aggrieved by any ruling of that court in matter of law, by bringing the question before this court on exceptions or appeal. *Taylor* v. *Taunton,* 113 Mass. ——; *Tucker* v. *Massachusetts Central Railroad, ante,* 124. If the verdict, as the defendant suggests, should be held so indefinite as to be a nullity, his position would not be strengthened. Whether the verdict is good or bad, the order of the board stands.

5. The board of health, in exercising this and like powers under the statute, acts in behalf of all the inhabitants of the city. It is expressly charged by the Gen. Sts. c. 26, § 55, to take all necessary measures to prevent the exercise of any trade in violation of its order; and for that purpose it may, without special authority, bring a suit in the name of the city. *Winthrop* v. *Farrar,* 11 Allen 398; *Salem* v. *Eastern Railroad,* 98 Mass. 431; *Watertown* v. *Mayo,* 109 Mass. 315. In such a suit, as in any other lawfully brought in the name of the city, the bill may properly be signed by the mayor. *Central Bridge* v. *Lowell,* 15 Gray 106, 122; *Nichols* v. *Boston,* 98 Mass. 39.

6. It is only when the plaintiff takes the same position as if he had demurred in an action at law, and sets down the cause for hearing upon the bill and answer, and thereby precludes the defendant from proving his allegations, that the statements in the answer are to be taken to be true. *Perkins* v. *Nichols,* 11 Allen 542. But in the present case the plaintiff filed a general replication, and the parties afterwards submitted the case to the decision of the court upon an agreed statement of facts. The allegations in the answer are not, therefore, to be taken as true further than they are supported by the facts agreed.

7. The defendant having had full notice and opportunity to be heard before the jury and in the Superior Court, and not having lost such opportunity by any mistake as to his rights, and no error being shown in any stage of the proceedings, the injunction granted upon the filing of the bill should be made perpetual. *Winthrop* v. *Farrar,* 11 Allen 398.

Decree for the plaintiff.

For enforcement of the law by judicial process through the issue of the *mandamus* on the application of an administrative authority, see People v. N. Y., L. E. & W. R. R. Co., 104 N. Y. 58; Chicago &c. Ry. Co. v. Minnesota, 134 U. S. 418, *supra.* See also Interstate Commerce Commission v. Brimson, 154 U. S. 447, an instance of resort to the courts by administrative authorities to secure evidence.

2. Summary Administrative Proceedings.

JOHN DEN, EX DEM. MURRAY AND KAYSER V. THE HOBOKEN LAND AND IMPROVEMENT COMPANY.

Supreme Court of the United States. December, 1855.

18 How. (U. S.) 272.

Mr. Justice CURTIS delivered the opinion of the court.

This case comes before us on the certificate of a division of opinion of the judges of the Circuit Court of the United States for the District of New Jersey. It is an action of ejectment, in which both parties claim title under Samuel Swartout—the plaintiffs under the levy of an execution on the 10th day of April, 1839, and the defendants, under a sale made by the marshal of the United States for the district of New Jersey, on the 1st day of June, 1839—by virtue of what is denominated a distress warrant, issuing by the solicitor of the treasury under the act of Congress of May 15, 1820.

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No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the act of Congress.

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Its validity is denied by the plaintiffs, upon the ground that so much of the act of Congress as authorized it is in conflict with the Constitution of the United States.

In support of this position, the plaintiff relies upon that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish; the judges whereof shall hold their office during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could

exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant is issued, of his liberty and property, "without due process of law;" and, therefore, is in conflict with the fifth article of the amendments of the Constitution.

Taking these two objections together, they raise the question, whether, under the Constitution of the United States, a collector of the customs, from whom a balance of account has been found to be due, by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law?

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That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it "due process of law?" The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted upon by them

after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues. It is difficult at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of *Magna Charta* treats of their restraint.

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This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the states, after the Declaration of Independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default; and by such warrant proceed to collect it.

. . . . . .

Congress, from an early period, and in repeated instances, has legislated in a similar manner. By the fifteenth section of the "act to lay and collect a direct tax within the United States," of July 14, 1798, the supervisor of each district was authorized and required to issue a warrant of distress against any delinquent collector and his sureties, to be levied upon the goods and chattels, and for want thereof upon the body of such collector; and, failing of satisfaction thereby, upon the goods and chattels of the

sureties. 1 Stats. at Large, 602. And again, in 1813, (3 Stats. at Large, 33, § 28) and 1815, (3 Stats. at Large, 177, § 33) the comptroller of the treasury was empowered to issue a similar warrant against collectors of the customs and their sureties. This legislative construction of the Constitution, commencing so early in the government, when the first occasion of this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight on the question whether the proceeding adopted by it was "due process of law." *Prigg* v. *Pennsylvania,* 16 Pet. 621; *United States* v. *Nourse,* 9 Peters 8; *Randolph's Case,* 2 Brock. 447; *Nourse's Case,* 4 Cranch, C. C. R. 151; *Bullock's Case,* cited 6 Peters 485, note.

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, (2 Inst. 47, 50; *Hoke* v. *Henderson,* 4 Dev. N. C. Rep. 15; *Taylor* v. *Porter,* 4 Hill 146; *Van Zandt* v. *Waddel,* 2 Yerger 260; *State Bank* v. *Cooper,* Ibid. 599; *Jones' Heirs* v. *Perry,* 10 Ibid. 59; *Greene* v. *Briggs,* 1 Curtis 311) yet, this is not universally true. There may be, and we have seen that there are cases, under the law of England after *Magna Charta,* and as it was brought to this country and acted on here, in which process in its nature final, issues against the body, lands and goods of certain public debtors without such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings?

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal,

under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States* v. *Ferreira,* 13 How. 40. It is necessary to go further and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not.

Among the legislative powers of Congress are the powers "to lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and welfare of the United States; to raise and support armies; to provide and maintain a navy; to make all laws which may be necessary and proper for carrying into execution these powers."

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The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying into effect, includes all known and appropriate means of effectually collecting and disbursing the revenue; unless some such means shall be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in the payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its application continues.

As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity—and in many of the states so far as we know without objection—for this purpose, at the time the Constitution was formed. It may be added that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others which has

sometimes been carried out by summary methods of proceedings, and sometimes by systems of fines and penalties, but always in some way observed and yielded to.

It is true that in England all these proceedings were had in what is denominated the court of exchequer, in which Lord Coke says (4 Inst. 115), the barons are the sovereign auditors of the kingdom. But the barons exercise in person no judicial power in auditing accounts, and it is necessary to remember that the exchequer includes two distinct organizations, one of which has charge of the revenues of the crown, and the other has long been in fact, and now is for all purposes, one of the judicial courts of the kingdom, whose proceedings are and have been as distinct, in most respects, from those of the revenue side of the exchequer, as the proceedings of the circuit court of this district are from those of the treasury; and it would be an unwarrantable assumption to conclude that, because the accounts of receivers of revenue were settled in what were denominated the court of exchequer, they were judicial controversies between the king and his subjects, according to the ordinary course of the common law or equity. The fact, as we have already seen, was otherwise.

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COMMONWEALTH V. BYRNE.

Supreme Court of Appeals of Virginia. January, 1871.
20 Gratt. (Va.) 165.

MONCURE, P. The petitioner does not claim his discharge from imprisonment upon the ground that the Legislature had not a right to impose the tax, for the non-payment of which he was arrested; nor upon the ground that he did not use and enjoy the privilege on which the tax was imposed; nor upon the ground that he has paid the tax, or any part of it; nor upon the ground that, at the time of his arrest, he had any property out of which the tax, or any part of it, could have been made by a levy thereon. He does not even show, or say, that he has not, in his pocket, or at his command, the means of paying the tax. But he places his defence upon the grounds: *First.* That the law authorizing an arrest and

imprisonment in such cases is unconstitutional and void, because contrary to the constitutions both of the United States and of this State.

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First, as to the constitutionality of the law under which the petitioner was arrested.

That law is the 63d section of chapter 57 of the acts of the General Assembly, passed at the session of 1866-67, Sess. Acts, p. 849, and is in these words:

"63. Within ten days after the commissioner of the revenue shall have granted a certificate to obtain a license, he shall deliver to the sheriff or other collector of the taxes on such licenses, a list of all such certificates, as far as he may have progressed with the same; which list shall be the guide of the sheriff or collector in collecting the taxes imposed by law on such licenses. If the taxes be not paid, the sheriff or collector shall distrain, immediately upon the receipt of such list, for the amount with which any person may have been assessed; and he may sell, upon ten days' notice, so much of such person's property, subject to distress, as may be necessary to pay the taxes so assessed, and the costs attending its collection. If the sheriff or collector shall be unable to find sufficient property to satisfy the taxes so assessed, and the same shall not be immediately paid, the said sheriff or collector shall arrest the person so assessed, and hold him in custody until the payment is made, or until he enter into bond, with sufficient security, in a penalty at least double the amount of the taxes so assessed, conditioned for his appearance before the Circuit Court of his county or corporation, to answer such action of debt, indictment or information as may be brought against him, and to satisfy, not only the fine imposed, but to pay the taxes assessed; and it shall be lawful for the court, upon the trial of such action of debt, indictment or information, to render judgment upon such bond for the fine imposed and the taxes which may be assessed."

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Is the law in question contrary to that Bill of Rights of Virginia which declares that no man shall "be deprived of his liberty, except by the law of the land or the judgment of his peers?"

That a man may be deprived of his liberty by the law of the land is conceded by the very terms of the provision just mentioned. That he cannot "be deprived of his liberty except by the law of the land," necessarily implies that he may be deprived of it by the law of the land; and this is certainly an undeniable fact.

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What, then, is the meaning of these words, "law of the land," in this connection, and do they embrace the law under consideration? These are the questions we now have to dispose of.

The provision of our bill of rights in which these words are found, is similar to but not so extensive as the provision of the Constitution of the United States before referred to; and a like provision is contained in the constitution of every State in the Union. The meaning of such a provision has been the subject of consideration and decision in many cases. The most important of them all seems to be the case of *Murray's Lessee, &c.*, v. *Hoboken Land & Improvement Co.*, 18 How. U. S. R. 272-286, decided by the Supreme Court of the United States at December Term, 1855. Mr. Justice Curtis delivered the opinion of the court, which was unanimous. In that case it was held, among other things, that a distress warrant, issued by the solicitor of the treasury, under the act of Congress passed on the 15th of May, 1820 (3 Stats. at Large, 592), is not inconsistent with the constitution of the United States; that it was an exercise of *executive* and not of *judicial* power, according to the meaning of those words in the Constitution; and that it is not inconsistent with that part of the Constitution which prohibits a citizen from being deprived of his liberty or property without due process of law.

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In Blackwell on Tax Titles, p. 176, edition of 1864, chapter 9, the writer says: "Where the person against whom a tax has been legally assessed neglects or refuses to pay the tax voluntarily, after a notification and demand made by the collector in the manner provided by law, the necessities of the State compel a resort to coercive means. In some States the law requires the body of the delinquent to be arrested and imprisoned in satisfaction of the tax." *Bassett* v. *Porter*, 4 Cush. R. 487; *Daggett* v. *Everett*, 19 Maine R. 373; *Rising* v. *Granger*, 1 Mass. R. 47; *Appleton* v. *Hopkins*, 5 Gray's R. 530. "In other States, the law requires the tax to be collected out of the personal estate of the delinquent if a sufficiency can be found to satisfy it. In South Carolina the statute thus marshals the remedies: 1. A distress of the personal estate of the delinquent; 2. The sale of the land; 3. The seizure and imprisonment of the body. (*Kingman* v. *Glover*, 3 Rich. 127.) A violation of the order of remedies thus prescribed invariably renders the act of the officer illegal. It is the policy of the law to resort to the land itself only when all other remedies fail to enforce a satisfaction of the tax. The person or personal estate of the de-

linquent is regarded as the primary, the land the dernier resort. The tax never becomes a charge upon the land until the other remedies have been exhausted." "The law admits of no substitution or change in the order thus established. It is therefore held that the land of the delinquent cannot be sold in those States which authorize imprisonment, if his body can be found, nor can a resort be had to the land, in States where the personal estate is regarded as the primary fund, as long as a sufficiency of personal estate can be seized and sold in satisfaction of the tax: a sale of the land under such circumstances, is illegal and void."

I presume no one will contend, and I do not understand the learned counsel for defendant in error as contending in this case, that the law in question is unconstitutional in authorizing the sheriff or collector to distrain the property of the person assessed with taxes as therein mentioned, if they be not paid. The necessity of such a power, and its constant exercise from time immemorial, as we have seen, places its constitutionality on an impregnable basis. But it seems to be supposed that the law is unconstitutional in authorizing the sheriff or collector, if unable to find sufficient property to satisfy the taxes so assessed, and the same shall not be immediately paid, to arrest the person so assessed and hold him in custody until the payment is made, or until he enter into bond with sufficient security, as therein mentioned. Why should this power to arrest the person so assessed make the law unconstitutional any more than the power to distrain his goods? The ground of the objection is that a person cannot be deprived of his liberty except by the law of the land. But a person cannot be deprived of his property, any more than his liberty, except by the law of the land; and yet it is well settled, and must be admitted, that a person's property may be seized for non-payment of his taxes, upon the mere assessment of the commissioner of the revenue, and without any judgment of any court against him. Why may not his person be arrested for the same cause, when the law expressly authorizes such an arrest? We have seen that the authorities place the seizing of the property, and arresting of the person of the tax debtor, on the same footing in regard to the constitutional question we are now considering; and so they undoubtedly are. The power to arrest the person may not be so often given by tax laws as the power to distrain property; but a power to arrest the person is often given by such laws, and is sometimes necessary to make them efficient; and whenever it is necessary, the Legislature, which is charged with the important duty of raising a revenue for the sup-

port of the government, may constitutionally confer such a power. It is not contrary, as has been shown, to the provision of the Bill of Rights before referred to, nor is it contrary to any other provision of the Constitution. There is no provision in our Constitution, as there is in some of the other State Constitutions, which forbids imprisonment for debt. . . . .

But it is objected that imprisonment might be perpetual under this law, as it makes no provision for the discharge of the prisoner, even though he be insolvent.

If this be true, it may show the law to be harsh in its operation, but does not therefore show it to be unconstitutional. It may be a bad exercise of legislative discretion, but not an excess of legislative power. The courts may control the latter, but have nothing to do with the former.

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But it is said that the law is harsh, and indeed unconstitutional, in requiring the person arrested to give bond, &c., for his appearance before the Circuit Court of his county or corporation, to answer such action of debt, indictment or information, as may be brought against him, and to satisfy, not only the fine imposed, but the taxes assessed.

The law does not require him to give such a bond. He may discharge himself from custody by payment of the tax. What is said about the bond is for his benefit. He may give the bond, and obtain his discharge in that way, if he cannot, or does not, choose to pay the money. There is nothing unreasonable in the condition of the bond which he is thus authorized to give. He has incurred a fine, for which an action of debt, or an indictment, or an information lies, and he also owes the taxes assessed. The condition of the bond is not to pay the fine absolutely, but to answer to such action of debt, indictment or information as *may* brought against him, and to satisfy the fine imposed; that is, the fine which *may* be imposed on the trial of such action of debt, indictment or information; and also to pay the taxes assessed.

I therefore think the law under which the petitioner was arrested is constitutional.

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Even real property may be sold by summary administrative proceedings in order to collect a tax, when provided by law. Springer v. United States, 102 U. S. 586.

BERGEN V. CLARKSON.

Supreme Court of New Jersey. November, 1821.

6 N. J. L. 428.

This was an action of trespass brought by Bergen against Clarkson. . . . . .

KINSEY, C. J., delivered the opinion of the court. In this case two questions occur for our consideration. . . . . .

2. Whether, supposing the tax to have been legally voted and assessed, the warrant of distress and sale, under which the alleged trespass was committed, was a lawful process, or affords a sufficient and legal justification of the officer?

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2. Being of this opinion upon the first point of the case, as to the illegality of the tax itself, it might be unnecessary to consider the propriety of a warrant of distress and sale, which was the second question proposed. In a matter, however, of so much moment, we conceive it our duty to pave the way, at least, for a final settlement of this law, in order to prevent the expense and trouble which must be incurred in obtaining a decision upon it in another case.

If the tax in question had been legally imposed we are clearly of opinion that, by the terms of spirit of the charter, the corporation are not authorized to collect it by a warrant of distress and sale, upon the return and oath of the collector, that the person assessed is a delinquent.

When a tax is assessed, if it has been done in a legal manner, the quota apportioned upon each individual becomes a debt, and, if not paid, must be recovered by the corporation in due course of law; unless where the charter authorizes proceedings of a more summary kind; or unless a corporation is empowered by the common law to enact a by-law prescribing the mode in which their debts may be collected.

With regard to the charter by which the city of New Brunswick holds its corporate existence, it gives no such power, as is contended for, in general cases. It expressly authorizes a warrant of distress and sale in the case of fines and amercements, which being particularly specified, would seem, if any such argument were necessary, to exclude this mode of proceeding in all other cases.

By the common law, we consider it as clear, that corporations cannot make a by-law to enforce the payment of taxes, fines,

amercements or forfeitures, by warrant to distrain and sell the goods of the party who may have omitted to discharge his legal dues.

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It is no answer to this to say, that this is the mode in which the state taxes are collected; because there is an express law authorizing and directing it, and there can be no question as to the authority of the legislature to enact such a law. From the powers which are vested in the supreme legislative body of the country, no inference can be drawn to prove the powers of inferior corporations. A body of this kind can make no law which contravenes the common or statute law of the community, which tends to despoil the citizen of his birth right, unless such power is actually and expressly given them by charter. The act of incorporation does not, in the present case, vest such an authority; on the contrary, it expressly provides, in the sixth section, that their ordinances "shall not be repugnant to the laws of New Jersey."

Upon the whole, we are of opinion . . . . .

2. That the process issued by the director was void, and no justification to the officer; he must be answerable to the party injured, and look for indemnity to those under whose usurped authority he has acted.

Let the judgment be affirmed.

THE CITY OF ORLANDO V. PRAGG.

Supreme Court of Florida. January, 1893.

31 Florida 111.

Upon appeal from the Circuit Court of Orange County.

TAYLOR, J. John M. Pragg, the appellee, sued the city of Orlando, the appellant, in trespass.

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The defendant municipal corporation demurred. . . . . This demurrer being overruled, the case went to trial upon a plea of the general issue, and resulted in a verdict and judgment for the plaintiff in the sum of $300, and from this judgment an appeal is taken here.

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Two of the defendant's grounds of its motion for a new trial,

that was overruled, were, that the verdict of the jury was contrary to evidence, and contrary to the law of the case.

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The uncontradicted proof of the defendant shows that the plaintiff's property removed was in fact a nuisance; that he was given fair warning first to rectify it; then that the county board of health, having full power by law to abate nuisances and to appoint such agencies as it saw proper, had declared said property to be a nuisance and ordered the defendant to abate it. The plaintiff was again given fair notice of this action, and reasonable time to remove the offending property himself. Failing to do so, the city, having full power also by law to abate nuisances, through its marshal, without unnecessary damage, itself removes the cause of the nuisance; and the plaintiff sits listlessly by and makes no effort to look after or care for his property. Under these circumstances, if true, and they were not denied, the defendant city was not liable in law for any damages that necessarily resulted to the plaintiff in the removal or abatement of property that was *in fact* a nuisance. The verdict of the jury, therefore, was clearly contrary to the evidence and to the law of the case, and the defendant's motion for a new trial should have been granted.

The power conferred, in general terms, to *prevent* and *abate* nuisances, cannot be taken to authorize the condemnation and destruction of that as a nuisance which, in its nature, situation or use, is not such *in fact*. And if the city, acting under the general power, abate that as a nuisance that is not such *in fact*, it does so at its peril, and is liable for the damage done, if it turns out on proof that it has made a mistake. 1 Dillon on Municipal Corporations (4th ed.), Section 374; *Yates* v. *Milwaukee*, 10 Wall. 497; *Everett* v. *Council Bluffs*, 46 Ia. 66; Wood's Law of Nuisances, Section 744.

On the other hand, if the city under this general power, in proceeding against that as a nuisance which is *in fact* such because of its nature, situation, or use, it is then under the obligation to exercise the power of abatement in a reasonable manner so as to do the least injury to private rights. And if, where the *fact* of nuisance is clear, it exercises the power of abatement in an unreasonable, careless or negligent manner so as to produce unnecessary damage to private rights, it will be liable for the damage caused by such negligence. *State* v. *Newark*, 5 Vroom (34 N. J. L.) 264; 1 Dillon on Munic. Corp., Sec. 378; *Larson* v. *Furlong*, 50 Wis. 681; Wood's Law of Nuisances, Sec. 741.

But if, as is shown by the uncontradicted proofs in this case, the fact of nuisance is clear, and the owner thereof is notified that he must remove same, and is given a reasonable time in which to do so, and he fails, and the city, acting under its general power, or as the agent of the county board of health who have the same power, then remove or abate the same in such manner as not to bring about any *unnecessary* damage to the owner, then under the law the city is not liable.

The judgment appealed from is reversed, and a new trial ordered.

See also Fields v. Stokely, 99 Pa. St. 306, *infra*, which would seem to hold that summary administrative proceedings for the abatement of a nuisance are proper, even in the absence of a statute providing for them.

LAWTON V. STEELE.

Court of Appeals of New York. February, 1890.

119 N. Y. 226.

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 12, 1889, which reversed a judgment in favor of plaintiffs entered upon a verdict, and ordered a new trial.

This action was brought to recover the value of sixteen hoop or fike nets belonging to the plaintiffs, which were destroyed by defendant; twelve of the nets were found by defendant set in the waters of Black River bay, an inlet of Lake Ontario, for the purpose of catching fish, the four others were on shore. Defendant was a state fish and game protector and justified as such; the provision of the statute under which he justified is set forth in the opinion.

ANDREWS, J.

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The point of difference between the trial court and the General Term relates to the constitutionality of the second section of the act of 1880, as amended in 1883. That section is as follows: "Sec. 2. Any net found, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found or maintained in or upon any of the waters of this

State, or upon the shores or islands in any waters of this State, in violation of any existing or hereafter enacted statutes or laws, for the protection of fish, is hereby declared to be, and is a public nuisance, and may be abated and summarily destroyed by any person; and it shall be the duty of each and every (game and fish) protector aforesaid and of every game constable, to seize and remove and destroy the same, ... and no action for damages shall be maintained against any person for or on account of any such seizure or destruction." The defendant justified the seizure and destruction of nets of the plaintiff, as a game protector, under this statute, and established the justification, if the legislature had the constitutional power to authorize the summary remedy provided by the section in question. The trial judge held the act in this respect to be unconstitutional, and ordered judgment in favor of the plaintiffs for the value of the nets. The General Term sustained the constitutionality of the statute and reversed the judgment. We concur with the General Term for reasons which will now be stated.

The legislative power of the State which by the Constitution is vested in the senate and assembly (§ 1, art. 3), covers every subject which in the distribution of the powers of government between the legislative, executive, and judicial departments, belongs by practice or usage, in England or in this country, to the legislative department, except in so far as such power has been withheld or limited by the Constitution itself, and subject also to such restrictions on its exercise as may be found in the Constitution of the United States.

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The act in question declares that nets set in certain waters are public nuisances, and authorizes their summary destruction. The statute declares and defines a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests or to the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property to be a nuisance for the purpose of devoting it to destruction. If the

court can judicially see that the statute is a mere evasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional, but not otherwise. *In re Jacobs,* 98 N. Y. 98; *Mugler* v. *Kansas,* 123 U. S. 661.

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The legislative power to regulate fishing in public waters has been exercised from the earliest period of the common law. . . .

The more difficult question arises upon the provision in the second section of the act of 1883, which authorizes any person, and makes it the duty of the game protector, to abate the nuisance caused by nets set in violation of law, by their summary destruction. It is insisted that the destruction of nets by an individual, or by an executive officer so authorized, without any judicial proceeding, is a deprivation of the owner of the nets of his property, without due process of law, in contravention of the Constitution. The right of summary abatement of nuisances without judicial process or proceeding, was an established principle of the common law long before the adoption of our Constitution, and it has never been supposed that this common law principle was abrogated by the provision for the protection of life, liberty and property in our State Constitution, although the exercise of the right might result in the destruction of property.

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Quarantine and health laws have been enacted from time to time from the organization of our State government, authorizing the summary destruction of infected cargo, clothing or other articles, by officers designated, and no doubt has been suggested as to their constitutionality.

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Van Wormer v. *Mayor,* etc., 15 Wend. 263, sustained the right of a municipal corporation to dig down a lot in the city, to abate a nuisance, although in the process of abatement buildings thereon were pulled down. In *Meeker* v. *Van Renssalaer,* 15 Wend. 397, the court justified the act of the defendant as an individual citizen in tearing down a filthy tenement house which was a nuisance, to prevent the spread of the Asiatic cholera.

These authorities sufficiently establish the proposition that the constitutional guarantee does not take away the common law right of abatement of nuisances by summary proceedings, without judicial trial or process. But in the process of abating a nuisance there are limitations both in respect of the agencies which may be employed, and as to what may be done in execution of the remedy.

The general proposition has been asserted in text-books and repeated in judicial opinions, that any person may abate a public nuisance. But the best considered authorities in this country and England now hold that a public nuisance can only be abated by an individual where it obstructs his private right, or interferes at the time with his enjoyment of a right common to many, as the right of passage upon the public highway, and he thereby sustains a special injury. *Brown* v. *Perkins*, 12 Gray 89; *Mayor of Colchester* v. *Brooke*, 7 A. & El. 339; *Dimes* v. *Petley*, 15 id. 276; *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. 44; *Harrower* v. *Ritson*, 37 Barb. 301.

The public remedy is ordinarily by indictment for the punishment of the offender, wherein on judgment for conviction the removal or destruction of the thing constituting the nuisance, if physical and tangible, may be adjudged, or by bill in equity filed in behalf of the people. But the remedy by judicial prosecution, *in rem* or *in personam*, is not, we conceive, exclusive, where the statute in a particular case gives a remedy by summary abatement, and the remedy is appropriate to the object to be accomplished. There are nuisances arising from conduct, which can only be abated by the arrest and punishment of the offender, and in such cases it is obvious that the legislature could not directly direct the sheriff or other officer to seize and flog or imprison the culprit. The infliction of punishment for crime is the prerogative of the court and cannot be usurped by the legislature. The legislature can only define the offense and prescribe the measure of punishment, where guilt shall have been judicially ascertained. But as the legislature may declare nuisances, it may also, where the nuisance is physical and tangible, direct its summary abatement by executive officers, without the intervention of judicial proceedings in cases analogous to those where the remedy by summary abatement existed at common law.

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But the remedy by summary abatement cannot be extended beyond the purpose implied in the words, and must be confined to doing what is necessary to accomplish it. And here lies, we think, the stress of the question now presented. It cannot be denied that in many cases a nuisance can only be abated by the destruction of the property in which it consists. The cases of infected cargo or clothing and of impure and unwholesome food are plainly of this description. They are nuisances *per se* and their abatement is their destruction. So, also, there can be little doubt, as we conceive, that obscene books, or pictures, or implements only capable

of an illegal use, may be destroyed as a part of the process of abating the nuisance they create, if so directed by statute. The keeping of a bawdy house, or a house for the resort of lewd and dissolute people, is a nuisance at common law. But the tearing down of the building so kept would not be justified as the exercise of the power of summary abatement, and it would add nothing, we think, to the justification that a statute was produced authorizing the destruction of the building summarily as a part of the remedy. The nuisance consists in the case supposed in the conduct of the owner or occupants of the house, in using or allowing it to be used for the immoral purpose, and the remedy would be to stop the use. This would be the only mode of abatement in such case known to the common law, and the destruction of the building for this purpose would have no sanction in common law or precedent. See *Babcock* v. *City of Buffalo*, 56 N. Y. 268; *Barclay* v. *Commonwealth*, 25 Penn. St. 503; *Ely* v. *Board of Supervisors*, 36 N. Y. 297.

But where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, as in the case of the float in the Albany basin (9 Wend. 571), or the nets in the present case, the legislature may, we think, authorize its summary abatement by executive agencies without resort to judicial proceedings, and any injury or destruction of the property necessarily incident to the exercise of the summary jurisdiction, interferes with no legal right of the owner. But the legislature cannot go further. It cannot decree the destruction or forfeiture of property used so as to constitute a nuisance as a punishment of the wrong, nor even, we think, to prevent a future illegal use of the property, it not being a nuisance *per se*, and appoint officers to execute its mandate. The plain reason is that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers, and under the guise of exercising the power of summary abatement of nuisances, the legislature cannot take into its own hands the enforcement of the criminal or *quasi* criminal law. See opinion of Shaw, Ch. J., in *Fisher* v. *McGirr*, *supra*, and in *Brown* v. *Perkins*, 12 Gray 89.

The inquiry in the present case comes to this: Whether the destruction of the nets set in violation of law, authorized and required by the act of 1883, is simply a proper, reasonable and necessary regulation for the abatement of the nuisance, or transcends

that purpose and is to be regarded as the imposition and infliction of a forfeiture of the owner's right of property in the nets, in the nature of a punishment. We regard the case as very near the border line, but we think the legislation may be fairly sustained on the ground that the destruction of the nets so placed is a reasonable incident of the power to abate the nuisance. The owner of the nets is deprived of his property, but not as the direct object of the law, but as an incident to the abatement of the nuisance. Where a private person is authorized to abate a public nuisance, as in case of a house built in a highway, or a gate across it, which obstructs and prevents his passage thereon, it was long ago held that he was not required to observe particular care in abating the nuisance, and that although the gate might have been opened without cutting it down, yet the cutting down would be lawful. *Lodie* v. *Arnold,* 2 Salk. 458, and cases cited. But the general rule undoubtedly is that the abatement must be limited by necessity, and no wanton or unnecessary injury must be committed. 3 Bl. 6, note. It is conceivable that nets illegally set could, with the use of care, be removed without destroying them. But in view of their position, the difficulty attending their removal, the liability to injury in the process, their comparatively small value, we think the legislature could adjudge their destruction as a reasonable means of abating the nuisance.

These views lead to an affirmance of the order of the General Term.

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It is insisted that the provision of the act of 1883 authorizes the destruction of nets found on the land, on shores or islands adjacent to waters, where taking of fish by nets is prohibited, and that this part of the statute is in any view unconstitutional. Assuming this premise it is claimed that the whole section must fall, as the statute, if unconstitutional as to one provision, is unconstitutional as a whole. This is not, we think, the general rule of law, where provisions of a statute are separable, one of which only is void. On the contrary the general rule requires the court to sustain the valid provisions, while rejecting the others. Where the void matter is so blended with the good that they cannot be separated, or where the court can judicially see that the legislature only intended the statute to be enforced in its entirety, and that by rejecting part the general purpose of the statute would be defeated, the court, if compelled to defeat the main purpose of the statute, will not strive to save any part. See *Fisher* v. *McGirr, supra.*

The order granting a new trial should be affirmed and judgment absolute ordered for the defendant on the stipulation, with costs.

All concur, O'BRIEN, J., not sitting.

Order affirmed and judgment accordingly.

LAWTON V. STEELE.

Supreme Court of the United States. March, 1894.

152 U. S. 133.

Mr. Justice BROWN, after stating the case, delivered the opinion of the court.

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It is not easy to draw the line between cases where the property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room.

The value of the nets in question was but $15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen) by judicial proceedings, would largely exceed the value of the net, and doubtless the State would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the State ought not to be hampered in its en-

forcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a State in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offences before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. In *Callan* v. *Wilson*, 127 U. S. 540, and cases cited. So the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

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It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may as readily be used for a lawful purpose, (*Ely* v. *Supervisors*, 36 N. Y. 297), but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question, (*People* v. *West*, 106 N. Y. 293,) and in such case the legislature may annex to the prohibited act all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance.

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It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value—*Ieck* v. *Anderson*, 57 Cal. 251, boats as well as nets; *Dunn* v. *Burleigh*, 62 Maine 24, teams and supplies in lumber; *King* v. *Hayes*, 80 Maine 206, a horse; in others the court seems to have taken a more technical view of the law than the necessities of the case or an adequate protection of the owner required. *Lowry* v. *Rainwater*, 70 Mo. 152; *State* v. *Robbins*, 124 Ind. 308; *Ridgway* v. *West*, 60 Ind. 371.

Upon the whole we agree with the Court of Appeals in holding this act to be constitutional, and the judgment of the Supreme Court is, therefore,

Affirmed.

FIELDS V. STOKELY.

Supreme Court of Pennsylvania. January, 1882.

99 Penn. St. 306.

January 6th, 1882. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY, STERRETT, and GREEN, JJ.

Error to the Court of Common Pleas No. 1, of Philadelphia County; of January Term, 1880, No. 329.

Tresspass, by George F. Fields against William S. Stokely, to recover damages for the destruction of a wooden building belonging to the plaintiff which had been torn down and demolished by defendant's orders. Pleas, not guilty, and a special plea, to which a demurrer was sustained.

Defendant then filed an additional plea, all the facts set forth in which were admitted on the trial to wit: That the defendant was, in September, 1876, at the date of the alleged trespass, mayor of Philadelphia, and also a citizen, tax-payer and property owner; that the United States Centennial Exhibition was then in progress at Fairmount Park; that the plaintiff and others, in violation of an ordinance of councils, had erected on Elm avenue, bordering on the exhibition grounds, numbers of wooden booths, sheds, shanties and buildings, composed wholly of highly combustible materials, insufficiently provided with chimneys or protected against fire; that of the plaintiff being occupied as a bar-room, and the resort of disorderly persons; that the said premises were in close prox-

imity to the buildings of the city, state, and other buildings of the International Exhibition, which were thereby imperiled. That the grand jury made a special presentment to the quarter sessions of the said wooden buildings as common nuisances, dangerous to life and property whereupon the judge then holding said court, ordered the defendant, as mayor, to abate said nuisance by tearing down and removing said buildings, if the owner thereof, after forty-eight hours notice, failed to do so; and the plaintiff having failed to remove the buildings in question after notice, the defendant caused the same to be torn down, doing as little damage as he reasonably could, &c.

It further appeared on the trial before Peirce, J., that the plaintiff had leased the lots whereon the buildings in question was erected; that it was so erected without a permit from the building inspectors, and without authority from councils, the mayor having vetoed an ordinance which had been passed permitting its erection; the plaintiff and his builder admitted that they knew they were erecting the building in violation of law.

The plaintiff requested the court to instruct the jury: "That the defendant acted wholly without authority of law in tearing down the building of the plaintiff, and he is liable for the damage resulting from his commands, and the jury should find a verdict for the plaintiff for the amount of damages which they believe, according to the evidence, he sustained." *Answer.* I do not affirm that point; on the contrary, I negative it, leaving to you the question of nuisance, or no nuisance; then if no nuisance the plaintiff is entitled to the damage sustained; and if nuisance, if the plaintiff maintained a nuisance there, he is not entitled to damages."

In the general charge the judge said: "The first question which arises in this case is, was or was not this building, thus taken down by the mayor, a nuisance? Was it such a common peril to the welfare of the citizens of Philadelphia, and to all who were to assemble here and visit the great exhibition, to the property exposed to danger, as to amount to a nuisance? . . . . . If you find it to be a nuisance, then I say that the defendant must justify himself under the fact that it was a nuisance, and especially acting as the head of a great municipality; acting under the order of a judge of a court; acting upon the presentment of a grand jury, all tend to show that it was not mere private thought or feeling; that he was not prompted to it by any desire to do any particular wrong to this individual. . . . . You will look at the whole case carefully, and at the facts and the law as I have given

it to you, and if you find that the plaintiff was maintaining a nuisance there, then he is not entitled to recover at all, and your verdict should be for the defendant. If, on the contrary, there was no nuisance there, then you will give such damages as the plaintiff would be entitled to recover under the evidence and facts as they have been testified to here."

Verdict and judgment for defendant. The plaintiff took this writ of error, (1) the refusal of the court to affirm his point, as above, and, (2) "that the entire charge was calculated to mislead the jury in this, that a wooden building erected on private freehold could be a public nuisance; and that, without any conviction on indictment, or a decree of a court, an individual who was a mayor could abate it at his will."

Chief Justice SHARSWOOD delivered the opinion of the Court, January 23d, 1882.

It appears by the record before us that it was expressly agreed, after the trial had progressed some time, that all the facts set forth in the special plea, not already proved, should be considered as having been proved. The plea, *inter alia*, avers that the houses mentioned in the declaration and for the removal of which this action was brought were composed of wholly or highly inflamable and combustible materials, and were insufficiently provided with chimneys and the usual and ordinary appliances for protection against fire, and were so used constantly, night and day, by drunken and disorderly persons, that the lives, health and property of citizens were greatly endangered and the public safety imperilled. The question whether they were a public nuisance was fairly submitted to the jury by the learned judge below, and the verdict of the jury in favor of the defendant established that fact. Had the presentment by the grand jury been followed up by an indictment, trial and conviction of the plaintiff below, the judgment thereon would have been that the nuisances should be abated, and would have been a conclusive justification of the action of the defendant. The defendant was the mayor of the city, and charged with the conservation of the peace and the protection of the property of the city. It is true that a wooden building, though erected contrary to law, is not *per se* a public nuisance. But it may become such by the manner in which it is used or allowed to be used. It is true that a private person not specially aggrieved cannot abate a public nuisance, and especially where a statute provides a remedy for an offense created by it, that must be followed. It is well settled, however, that a private

person, if specially aggrieved by a public nuisance, may abate it.

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The jury, under the charge of the learned judge, has found these buildings to be of that character. The city of Philadelphia was the owner of large and valuable property in their neighborhood. Any hour of the day and night they were in danger of being set on fire by those who frequented them with the owner's permission. It is stated as a fact in the special plea, and of course a fact admitted by the agreement, that the public safety was imperilled. Nothing more was necessary to justify the action of the defendant. If the owner or tenant of a powder magazine should madly or wickedly insist on smoking a cigar on the premises, can anyone doubt that a policeman or even a neighbor could justify in trespass for forcibly ejecting him and his cigar from his own premises? It is true, that a private person assuming to abate a public nuisance takes upon himself the responsibility of proving to the satisfaction of a jury, the fact of nuisance. The official position of the defendant, as mayor of Philadelphia, did not relieve him from his personal responsibility in this respect. But he has been sustained by the verdict of a jury, which is a justification of his alleged trespass. We are of opinion that this case was properly submitted to the determination of the jury, that there was nothing in the charge calculated to mislead them, and that it would have been manifest error if the learned judge had affirmed the plaintiff's point, and thereby in effect instructed the jury to find a verdict in his favor.

Judgment affirmed.

Summary administrative proceedings, when authorized by statute, may constitutionally be made use of to deprive one who is suffering from a contagious disease of his liberty by confining him in a hospital. Haverty v. Bass, 66 Me. 71.

CHAPTER VIII.

LIABILITY OF THE GOVERNMENT FOR ACTS OF OFFICERS.

I. At Common Law.

THE SIREN.

Supreme Court of the United States. December, 1868.

7 Wall. 152.

The steamer Siren was captured in the harbor of Charleston in attempting to violate the blockade of that port, in February, 1865, by the steamer, Gladiolus, belonging to the navy of the United States. She was placed in charge of a prize master and crew, and ordered to the port of Boston for adjudication. On her way she was obliged to put into the port of New York for coal, and, in proceeding thence, through the narrow passage which leads to Long Island Sound, known as Hurlgate, she ran into and sank the sloop Harper, loaded with iron and bound from New York to Providence, Rhode Island. The collision was regarded by this court, on the evidence, as the fault of the Siren.

On the arrival of the steamer at Boston, a libel in prize was filed against her, and no claim having been presented, she was in April following, condemned as lawful prize, and sold. The proceeds of the sale were deposited with the assistant treasurer of the United States, in compliance with the act of Congress, where they now remain, subject to the order of the court.

In these proceedings the owner of the sloop Harper, and the owners of her cargo, intervened by petition, asserting a claim upon the vessel and her proceeds, for the damage sustained by the collision, and praying that their claims might be allowed, and paid out of the proceeds.

The District Court held that the intervention could not be allowed, and dismissed the petitions; and hence the present appeals.

Mr. Justice Field delivered the opinion of the court.

It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and

danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of the court in *United States* v. *Clarke*, 8 Peters 444.

The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits against its property.

But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institutes a suit, they waive their exemption so far as to allow a presentation by the defendant of the set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy. In *United States* v. *Ringgold*, 8 Peters 150, a claim of the defendant was allowed as a set-off to the demand of the government. "No direct suit," said the court, "can be maintained against the United States. But when an action is brought by the United States to recover moneys in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress." So in *United States* v. *Macdaniel*, 7 Peters 16, to which reference is made in the case cited, the defendant was allowed to set off against the demand of the government a claim for services as agent for the payment of the navy pension fund, to which the court held he was equitably entitled. The question said the court, was, whether the defendant should

surrender the money which happened to be in his hands, and then petition Congress on the subject; and it was held the government had no right, legal or equitable, to the money.

For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case, the claim exists equally as if the vessel belongs to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

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The inability to enforce the claim against the vessel is not inconsistent with its existence.

Seamen's wages constitute preferred claims, under the maritime law, upon all vessels; yet they cannot be enforced against a vessel of the nation, or a vessel employed in its service. In a case before the Admiralty Court of Pennsylvania, in 1781, it was adjudged, on a plea to the jurisdiction, that mariners enlisting on board a ship of war belonging to a sovereign independent state could not libel the ship for their wages.

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Even where claims are made liens upon the property by statute, they cannot be enforced by direct suit, if the property subsequently vests in the government. Thus in Massachusetts, the statutes provide, that any person to whom money is due for labor and materials furnished in the construction of a vessel in that commonwealth, shall have a lien upon her, which shall be preferred to all other liens except mariners' wages, and shall continue until the debt is paid, unless lost by a failure to comply with certain specific conditions; yet in a recent case, where a vessel subject to a lien of this character was transferred to the United States, it was held the lien could not be enforced in the courts of that state. The decision was placed on the general exemption of the government and its property from legal process. *Briggs et al.* v. *Light Boats*, 11 Allen, 157.

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The authorities to which we have referred are sufficient to show that the existence of a claim, and even of a lien upon property, is not always dependant upon the ability of the holder to enforce

it by legal proceedings. A claim for lien existing or continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control. Then the rights and interests of all parties will be respected and maintained. Thus, if the government, having title to the land subject to the mortgage of the previous owner, should transfer the property, the jurisdiction of the court to enforce the lien would at once attach, as it existed before the acquisition of the property by the government.

So if property belonging to the government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principle by which justice is administered between private suitors.

Now, it is a settled principle of admiralty law, that all maritime claims upon a vessel extend equally to the proceeds arising from its sale, and are to be satisfied out of them. Assuming, therefore, that the Siren was in fault, and that by the tort she committed a claim was created against her, we do not perceive any just ground for refusing its satisfaction out of the proceeds of her sale. The government is the actor in the suit for her condemnation. It asks for her sale, and the proceeds coming into the registry of the court, come affected with all the claims which existed on the vessel created subsequent to her capture. There is no authority that we are aware of, which would exempt them under these circumstances, because of the exemption of the government from a direct proceeding *in rem* against the vessel while in its custody.

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It does not appear that the court below considered the evidence as to the character and extent of the alleged tort. It appears to have placed its decision entirely upon the legal proposition, that the captured vessel was exempt from legal process at the suit of the interventors, and that consequently the proceeds of the vessel could not be subjected to the satisfaction of their claims. We have, however, looked into the evidence, and are satisfied that the collision was the fault of the Siren.

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The decree must be reversed, and the cause remanded to the

court below, with directions to assess the damages and pay them out of the proceeds of the vessel before distribution to the captors.

Ordered accordingly.

Mr. Justice NELSON dissenting.

The government may by ratification make itself liable for contracts made by its officers without authority of law. Wisconsin v. Torinus, 26 Minn. 1.

II. BY STATUTE.

DOOLEY V. UNITED STATES.

Supreme Court of the United States. October, 1900.

182 U. S. 222.

This was an action begun in the Circuit Court, as a Court of Claims, by the firm of Dooley, Smith & Co., engaged in trade and commerce between Porto Rico and New York, to recover back certain duties to the amount of $5,374.58, exacted and paid under protest at the port of San Juan, Porto Rico, upon several consignments of merchandise imported into Porto Rico from New York between July 26, 1898, and May 1, 1900.

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A demurrer was interposed upon the ground of the want of jurisdiction, and the insufficiency of the complaint. The Circuit Court sustained the demurrer upon the second ground, and dismissed the petition. Hence this writ of error.

Mr. Justice BROWN, after making the above statement, delivered the opinion of the court.

1. The jurisdiction of the court in this case is attacked by the Government upon the ground that the Circuit Court, as a Court of Claims, cannot take cognizance of actions for the recovery of duties illegally exacted.

By an act passed March 3, 1887, to provide for the bringing of suits against the government, known as the Tucker Act, 24 Stat. 505, c. 359, the Court of Claims was vested with jurisdiction over "first, all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract,

express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in court of law, equity or admiralty, if the United States were suable;" and by section 2 the District and Circuit Courts were given concurrent jurisdiction to a certain amount.

The first section evidently contemplates four distinct classes of cases: (1) those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an Executive Department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases *not sounding in tort*. The words "not sounding in tort" are in terms referable only to the fourth class of cases.

The exception to the jurisdiction is based upon two grounds: First, that the court has no jurisdiction of cases arising under the revenue laws; and, second, that it has no jurisdiction in actions for tort.

In support of the first proposition we are cited to the case of Nichols v. United States, 7 Wall. 122, in which it was broadly stated that "cases arising under the revenue laws are not within the jurisdiction of the Court of Claims."

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By the Customs Administrative Act of 1890, as we have just held in *De Lima* v. *Bidwell*, an appeal is given from the decision of the collector "as to the rate and amount of duties chargable upon imported merchandise," to a board of general appraisers, whose decision shall be final and conclusive 'as to the construction of the law and the facts respecting the classification of such merchandize and the rate of duties imposed thereon under such classification," unless application be made for a review to the Circuit Court of the United States. This remedy is doubtless exclusive as applied to customs cases; but, as we then held, it has no application to actions against the collector for duties exacted upon goods which were not imported at all. Such cases, although arising under the revenue laws, are not within the purview of the Customs Administrative Act; as for such cases there is still a common law right of action against the collector, and we think also by application to the Court of Claims. There would seem to be no doubt about plaintiff's remedy against the collector at San Juan.

In the *Nichols* case, it was held that, as there was a remedy of action against the collector, expressly provided by statute, that remedy was exclusive. In *De Lima* v. *Bidwell* we held that although no other remedy was given expressly by statute than that provided by the Customs Administrative act, there was still a common law remedy against the collector for duties exacted upon goods not imported at all; but it does not therefore follow that this remedy is exclusive; and that the importer may not avail himself of his right of action in the Court of Claims.

But conceding that the *Nichols* case does not stand in the way of a suit in the Court of Claims, the government takes the position that a suit in the United States to recover back duties illegally exacted by a collector of customs is really an action "sounding in tort," though not an action "for damages, liquidated or unliquidated," within the fourth class of cases enumerated in the Tucker act.

There are a number of authorities in this court upon that subject which require examination. The question, is, whether any claim sounding in tort can be prosecuted in the Court of Claims, notwithstanding the words "not sounding in tort," in the Tucker act, are apparently limited to claims for damages, liquidated or unliquidated. The question was first considered in *Langford* v. *United States*, 101 U. S. 341, under the statute above cited, giving the court of Claims power to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States." The suit was brought to recover for the use and occupation of certain lands and buildings of which possession had been forcibly taken by agents of the government, against the will of Langford, who claimed title to the lands. It was held that the act of the United States in taking and holding possession was an unequivocal tort, and a distinction was drawn between such a case and one where the government takes for public use lands to which it asserts no claim of title, but admits the ownership to be private or individual, in which class there arises an implied obligation to pay the owner its just value. "It is a very different matter where the government claims it is dealing with its own, and recognizes no title superior to its own. In such case the government, or the officers who seize such property, are guilty of a tort, if it be in fact private property." It was held that the limitation of the act to cases of contract, express or implied, "was established in

reference to the distinction between actions arising out of contracts, as distinguished between those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law."

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In the cases under consideration the argument is made that the money was tortiously exacted; that the alternative of payment to the collector was a seizure and sale of the merchandise for the non-payment of duties; and it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not; whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker act of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the Court of Claims, under the Tucker act, has been repeatedly sustained.

Thus, in *United States* v. *Kaufman,* 96 U. S. 567, a brewer who had been illegally assessed for a special tax upon his business, was held entitled to bring suit in the Court of Claims to recover back the amount, on the ground that no special remedy had been provided for the enforcement of the payment, and consequently the general laws which govern the Court of Claims, may be resorted to for relief, if any can be found applicable to such a case. This is upon the principle that a liability created by statute without a remedy may be enforced by a common-law action. The *Nichols* case was distinguished upon the ground that the statute there *had* provided a special remedy.

So, too, in *United States* v. *Savings Bank,* 104 U. S. 728, the Court of Claims was held to have jurisdiction of a suit to recover back certain taxes and penalties assessed upon a savings bank.

In *Campbell* v. *United States,* 107 U. S. 407, it was held that a party claiming to be entitled to a drawback of duties upon manufactured articles exported might, when payment thereof has been refused, maintain a suit in the Court of Claims, because the facts found raised an implied contract that the United States would refund to the importer the amount he had paid to the government. There was here no question of tort.

In *United States* v. *Great Falls Manufacturing Co.,* 112 U.

S. 645, it was held, following the observations of Mr. Justice Miller, in *Langford* v. *United States*, that where property to which the United States *asserts no title* is taken by their officers or agents, pursuant to an act of Congress, as private property for public use, there was an implied obligation to compensate the owner, which might be enforced by suit in the Court of Claims.

So, too, in *Hollister* v. *Benedict & Burnham Mfg. Co.*, 113 U. S. 59, it was held that a suit might be maintained in the Court of Claims to recover the use of a patented invention, if the right of the patentee were acknowledged. To the same effect are *United States* v. *Palmer*, 128 U. S. 262, and *United States* v. *Berden Fire-Arms Co.*, 156 U. S. 552.

In *Medbury* v. *United States*, 173 U. S. 492, it was held the Court of Claims had jurisdiction of an action to recover an excess of payment for lands within the limits of a railroad grant, which grant was, subsequent to the payment, forfeited by an act of Congress for non-construction of the road.

In *Swift* v. *United States*, 111 U. S. 22, the same right was created as existing in favor of a party who sued for a commission upon the amount of certain adhesive stamps, which he had at the time purchased for his own use from the Bureau of Internal Revenue. See also *United States* v. *Lawson*, 101 U. S. 164; *Mosby* v. *United States*, 133 U. S. 273.

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The judgment of the circuit court is therefore reversed and the case remanded to that court for further proceedings in consonance with this opinion.

LEWIS V. STATE OF NEW YORK.

Court of Appeals of New York. May 6, 1884.

96 N. Y. 71.

Appeal from a decision of the Board of Claims, rendered October 10, 1883, dismissing a claim preferred by the appellant against the State on the ground that the facts stated in the petition did not constitute a cause of action.

DANFORTH, J. The claimant in March, 1879, was convicted of the crime of burglary and sentenced to the state prison.

. . . . . .

The claimant was set at work in the hollow-ware department, and while engaged in carrying molten iron in a ladle discovered a crack in the shank which connected the bowl with the handle. He called the overseer's attention to this defect, but no attention was paid to his complaint, and when next used by him the bowl separated from the shank, and the melted iron coming in contact with water on the floor exploded with such effect as to cause him serious injury. In January, 1882, he was discharged. In October, 1882, he presented to the Board of Audit a claim against the State for damages so incurred, and this claim was by force of the statute (Laws of 1883, chap. 205, S. 12) transferred to the Board of Claims, where it was dismissed, on the ground that the facts were not sufficient to constitute a cause of action against the State. From this decision an appeal is taken to this court.

It is now contended by the learned counsel for the appellant that the act of the overseer in compelling the claimant to use the defective ladle, after having been notified of its unsafe condition, was an act of the State and of gross and inexcusable negligence. It is apparent that even if this is so the claimant must fail unless the doctrine of *respondent superior* can be applied to the State, and the State made liable for the negligence or misfeasance of its agents, in like manner as a natural person is responsible for the acts of his servants. We are aware of no principle of law, nor of any adjudged case which makes that application, except when the State, by its legislature, has voluntarily assumed it. The contrary of this is well settled upon grounds of public policy, and the doctrine is so uniformly asserted by writers of approved authority and the courts that fresh discussion would be superfluous. Story on Agency, S. 319, 7th ed. Indeed the principle upon which the doctrine is founded—that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it, excludes such a case as we have before us. The claimant was not a voluntary servant for hire and reward, nor was the State his master in any ordinary sense. He was compelled to labor as a means of reformation, and to endure imprisonment as a punishment and for the protection of the community. While employed he was subject to such regulations as the keeper charged with his custody might, from time to time, prescribe, and if in the course of service he sustained injury, it must be attributed to the cause which placed him in confinement. He acquires thereby no claim against the State, nor do the statutes referred to by his learned

counsel (Laws of 1876, chap, 444; Laws of 1883, chap. 205) create any liability on his part. Therefore, no error was committed by the Board of Claims, and its decision should be affirmed.

All concur.

Decision affirmed.

THE FLOYD ACCEPTANCES.

Supreme Court of the United States. December, 1868.

7 Wall. 666.

Mr. Justice MILLER delivered the opinion of the court.

The cases before us are demands against the United States, founded upon instruments claimed to be bills of exchange, drawn by Russell, Majors & Waddell, on John B. Floyd, Secretary of War, and accepted by him in that capacity; purchased by plaintiffs before maturity, for a valuable consideration, and, as they allege, without notice of any defense to them.

Mr. Pierce, in his petition, relies on the facts that the signature of John B. Floyd, to these acceptances, is genuine, and that he was at the time of the acceptance Secretary of War, as sufficient to establish his claim. He avers that Floyd, as Secretary of War, had authority to accept the drafts, and that by his acceptance the United States became bound. It is evident that he means by this merely to assert, as a principle of law, that, by virtue of his office, the Secretary had such authority, and not that there existed, in this case, special facts which gave such authority; for he mentions no such facts in his petition, and when the solicitors for the defendant undertook to show under what circumstances the bills were issued and accepted, he objected to the evidence. Its admission is one of the alleged errors on which he brings the case to this court.

. . . . . .

It will be convenient, therefore, to consider, first, the proposition on which he rests his case, which, if found to be sound, disposes of all the cases in favor of plaintiffs.

One of the main elements of that proposition, much and eloquently urged upon our attention, seems to be too well established by the decisions of this court to admit now of serious controversy.

It must be taken as settled, that when the United States becomes a party to what is called commercial paper—by which is meant that class of paper which is transferable by indorsement or delivery, and between private parties is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation—they are bound in any court, to whose jurisdiction they submit, by the same principles that govern individuals in their relations to such paper.

Conceding, then, for the sake of argument, that the instruments under consideration are, in form, bills of that character, and that the signature of Floyd is genuine, and that he was at the time Secretary of War, there remains but one question to be considered essential to plaintiffs' right to recover, and that concerns the authority of the Secretary to accept the bills on behalf of the government.

. . . . . .

The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law. It would seem reasonable, then, that on the question of authority of the Secretary of War to accept bills of exchange, we must look mainly to the acts of Congress.

. . . . . .

Recurring, then, to the written law as the exclusive source of such authority, we may confidently assert that there is no express authority to any officer of the government to draw or accept bills of exchange.

. . . . . .

The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of an officer to pay money at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of

doing it. So, when an officer or agent of the government at a distance, is entitled to money here, the person holding the fund may pay his drafts. And whenever, in conducting any of the fiscal affairs of the government, the drawing of a bill of exchange is the appropriate means of doing that which the department, or officer having the matter in charge, has a right to do, then he can draw and bind the government in so doing. But the obligation resting on him to perform that duty, and his right and authority to effect such an object, is always open to inquiry, and if they be found wanting, or if they be forbidden by express statute, then the draft or acceptance is not binding on the government.

It cannot be maintained that, because an officer can lawfully issue bills of exchange for some purposes, that no inquiry can be made in any case into the purpose for which a bill was issued. The government cannot be held to a more rigid rule, in this respect, than a private individual.

. . . . . .

In accordance with these views, we are of opinion that, as there can be no lawful occasion for any department of the government, or for any of its officers, or agents, to accept drafts drawn on them, under any statute or other law now known to us, such acceptances cannot bind the government.

An examination of the facts found by the Court of Claims confirms the views already stated.

Counsel for the plaintiffs seem to have been of the opinion from the start, that there was nothing in the nature of the transaction which would support the paper on which they sued, for they steadfastly resisted all efforts on the part of the government to give the facts in evidence; and in the arguments made in this court, the right to recover is rested almost exclusively on the proposition that, because in some cases the secretary might lawfully accept, it must be presumed in their favor that these drafts were lawfully accepted.

It seems to us that such a transaction can be defended on no principle of law, and that, in thus lending to Russell & Co. the name and credit of the United States, the Secretary was acting wholly beyond the scope of his authority. The paper was, in fact, accommodation paper, as it was found to be by the Court of Claims, by which the Secretary undertook to make the United States acceptor for the sole benefit of the drawers. . . .

If these acceptances can be considered as payments, they were

payments in advance of the service rendered and supplies furnished—payments made before anything was due. They are in that view not only without authority of law, but are expressly forbidden by the act of January 31st, 1823. The first section of that statute, which has never been repealed, enacts "that, from and after the passing of this act, no advance of public money shall be made in any case whatever; but in all cases of contracts for the performance of any service, or the delivery of articles of any description for the use of the United States, payment shall not exceed the value of the services rendered, or the articles delivered previous to such payment."

The transaction by which these drafts were accepted was in direct violation of this law, and of the limitations which it imposes upon all officers of the government. Every citizen of the United States is supposed to know the law, and when a purchaser of one of these drafts began to make inquiries necessary to ascertain the authority for their acceptance, he must have learned at once that, if received by Russell, Majors & Waddell, as payment, they were in violation of law, and if received as accommodation paper, they were evasions of this law, and without any shadow of authority.

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These cases have long been before the departments, before Congress, and the Court of Claims, and have been the subject of much laborious consideration everywhere. The amount involved is large, the principles on which the claims are asserted are, to some extent, new, and we have given them a careful and earnest investigation. We are of opinion that the judgments rendered by the Court of Claims against the plaintiffs, must be

Affirmed.

Mr. Justice NELSON (with whom concurred GRIER and CLIFFORD, JJ.) dissenting.

See also for the powers an officer possesses to bind the government, Mulnix v. Mutual Life Ins. Co., 23 Col. 71. *infra.* Other instances of the liability of the government in contract are, Parsons v. United States, 167 U. S. 324; Shurtleff v. United States, 189 U. S. 311; Hall v. Wisconsin, 103 U. S. 5; Campbell v. United States, 107 U. S. 407; United States v. Langston, 118 U. S. 389; Kehn v. State, 93 N. Y. 291; Dunlap v. United States, 173 U. S. 65; United States v. Symonds, 120 U. S. 46; Romero v. United States, 24 Ct. of U. 431, and United States v. Saunders, 120 U. S. 126. When a contract has been legally made with the government, its liability is the same as that of an ordinary party unless limited by statute. People v. Stephens, 71 N. Y. 549

III. As a Result of Suits Against Officers.

UNITED STATES V. LEE.

Supreme Court of the United States. October, 1882.
106 U. S. 196.

Mr. Justice Miller delivered the opinion of the court.

These are two writs of error to the same judgment; one prosecuted by the United States, *eo nomine;* and the other by the Attorney-General of the United States, in the names of Frederick Kaufman and Richard P. Strong, the defendants against whom judgment was rendered in the Circuit Court.

The action was originally commenced in the Circuit for the county of Alexandrie, in the state of Virginia, by George W. P. C. Lee, against Kaufman and Strong and a great number of others, to recover possession of a parcel of land of about eleven hundred acres, known as the Arlington estate. It was in the form prescribed by the statutes of Virginia, under which the pleadings are in the names of the real parties, plaintiff and defendant.

As soon as the declaration was filed the case was, by writ of *certiorari,* removed to the Circuit Court of the United States, where all the subsequent proceedings took place.

. . . . . .

We have then two questions presented to the court and jury below, and the same questions arise in this court on the record:

1. Could any action be maintained against the defendants for the possession of the land in controversy under the circumstances of the relation of that possession to the United States, however clear the legal right to that possession might be in the plaintiff?

. . . . . .

The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the plaintiff has the title to the land in controversy, and that what is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as

officers and agents of the United States, and it is appropriated to lawful public uses.

This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents of the government.

The first branch of this proposition is conceded to be the established law of this country and of this court at the present day; the second, as a necessary or proper deduction from the first, is denied.

. . . . . .

While acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit.

. . . . . .

The earliest case in this court in which the true rule is laid down, and which, bearing a close analogy to the one before us, seems decisive of it, is *United States* v. *Peters*, 5 Cranch 115. In an admiralty proceeding commenced before the formation of the Constitution, and which afterwards came into the District Court of the United States for Pennsylvania, that court, after full hearing, had decided that the libellants were entitled to the proceeds of the sale of a vessel condemned as prize of war, which had come to the possession of David Rittenhouse as treasurer of Pennsylvania. The District Judge had declined to issue any process to enforce his decree against the representatives of Rittenhouse, on the ground that the funds were held as property of that state, and that as she could not be subjected to judicial process, neither could the officer who held the money in her right. The analogy to the case before us will be seen when it is further stated that this claim of the state to the money had been fully presented, and that the court had decided that the libellants and not the state were legally entitled to it. In that case, as in this, it was argued that the suit was in reality against the state. But, on application therefor, a writ of *mandamus* to compel the judge of the District

Court to proceed in the execution of his decree was granted. In delivering the opinion, Mr. Chief Justice Marshall says: "The state cannot be made a defendant to a suit brought by an individual, but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, when a state is not necessarily a defendant. In this case, the suit was not instituted against the state or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the Court of Admiralty, which were admitted to be in their possession. If these proceeds had been actual property of Pennsylvania, however wrongfully acquired, the disclosures of that fact would have presented a case on which it was unnecessary to give an opinion; *but it certainly can never be alleged that a mere suggestion of title in a state to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title.*"

The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to the plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States.

It may be said—in fact, it is said—that the present case differs from the one in 5 Cranch, because the officers who are sued assert no personal possession, but are holding as the mere agents of the United State, while the executors of Rittenhouse held the money until a better right was established.

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Osborn v. *Bank of United States,* 9 Wheat. 738, is a leading case, remarkable in many respects, and in none more than in those resembling the one before us.

It was this: The state of Ohio having levied a tax upon the branch of the Bank of the United States located in that state, which the bank refused to pay, Osborn, auditor of the state, was about to proceed to collect said tax by a seizure of the money of

the bank in its vaults, and an amended bill alleged that he had so seized $100,000, and while aware that an injunction had been issued by the Circuit Court of the United States on the prayer of the bank, the money so seized had been delivered to the treasurer of the state, Curry, and afterwards came to the possession of Sullivan, who had succeeded Curry as treasurer. Both Curry and Sullivan were made defendants as well as Osborn and his assistant, Harper.

One of the objections pressed with pertinacity all through the case to the jurisidiction of the court was the conceded fact that the state of Ohio, though not made a defendant to the bill, was the real party in interest. That all the parties sued were her officers—her auditor, her treasurer, and their agents—concerning acts done in their official character, and in obedience to her laws. It was conceded that the state could not be sued, and it was earnestly argued there, as here, that what could not be done directly could not be done by suing her officers. And it was insisted that while the state could not be brought before the court, it was a necessary party to the relief sought, namely, the return of the money and obedience to the injunction, and that the bill must be dismissed.

A few citations from the opinion of Mr. Chief Justice Marshall will show the views entertained by the court on the question thus raised:

"If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit."

In another place he says: "The process is substantially, though not in form, against the state . . . and the direct interest

of the state in the suit as brought is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the state was before the court. But this was not in the power of the bank . . . and the very difficult question is to be decided, whether, in such a case, the court may act upon agents employed by the state and on the property in their hands." In answering this question he says: "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases in which the government is in the exercise of its best-established and most essential powers, as well as in those which may be deemed questionable. It asserts that the agents of a state, alleging the authority of a law void in itself because repugnant to the Constitution, may arrest the execution of any law in the United States." Again: "The bank contends that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but it is not shown by the record to be a party." "If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person can be considered as a party, who is not made so in the record." Again: "In cases where a state is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the state, what rule has the Constitution given by which this interest is to be measured? If no rule is given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of the state's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?"

The decree of the Circuit Court ordering a restitution of the money was affirmed.

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These decisions have never been overruled. On the contrary, as late as the case of *Davis* v. *Gray*, 16 Wall. 203, the case of *Osborn* v. *Bank of United States* is cited with approval as establishing these among other propositions; "Where the state is concerned, the state should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record.

In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party is not making the state a party, *although her law may have prompted his action, and the state may stand behind him as a real party in interest.* A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

Though not prepared to say now that the court can proceed against the officer in "all respects" as if the state were a party, this may be taken as intimating in a general way the views of the court at that time.

. . . . . .

This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many cases where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound.

. . . . . .

The fact that the property which is the subject of this controversy is devoted to public uses, is strongly urged as a reason why those who are so using it under the authority of the United States shall not be used for its possession even by one who proves a clear title to that possession.

. . . . . .

The objection is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the Constitution of the United States, whose language is: "That no person . . . shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation."

Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the

verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases, indeed mostly all of them, are those in which life and liberty was invaded by persons assuming to act under the authority of the government. *Ex parte Milligan,* 4 Wall. 2.

If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation?

. . . . . .

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and to the legislative, to deprive anyone of life, liberty, or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the

judiciary as one of the departments of the government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and legislative branches of the government. See *Ex parte Milligan,* 4 Wall. 2; *Kilbourn* v. *Thompson,* 103 U. S. 168.

No man in this country is so high that he is above the law No officer of the law may set the law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial func-

tion, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen.

. . . . . .

The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is

Affirmed.

Mr. Justice GRAY, with whom concurred Mr. Chief Justice WAITE, Mr. Justice BRADLEY, and Mr. Justice WOODS, dissenting.

The same principle is applied by the Supreme Court to state officers. Tindal v. Wesley, 167 U. S. 204. Other instances of suits brought against officers which are really against the government, since the judgment is paid by the government, are Hilton v. Merritt, 110 U. S., 97, *supra*, and Field v. Clark, 143 U. S. 649.

IV. LIABILITY OF STATE TO ACTION IN UNITED STATES COURTS.

NEW HAMPSHIRE V. LOUISIANA AND OTHERS.

NEW YORK, V. LOUISIANA AND OTHERS.

Supreme Court of the United States. October, 1882.

108 U. S. 76.

Mr. Chief Justice WAITE delivered the opinion of the court. After stating the case he continued:

The first question we have to settle is whether upon the facts shown, these suits can be maintained in this court.

Art. III, sec. 2, of the Constitution provides that the judicial power of the United States shall extend to "controversies between two or more States," and "between a State and citizens of another State." By the same article and section it is also provided that in cases "in which a State shall be a party, the Supreme Court shall have original jurisdiction." By the Judiciary Act of 1789,

c. 20, sec. 13, 1 Stat. 80, the Supreme Court was given "exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens, and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction."

Such being the condition of the law, Alexander Chisholm, as executor of Robert Farqhuar, commenced an action of assumpsit in this court against the State of Georgia, and process was served on the governor and attorney-general. *Chisholm* v. *Georgia,* 2 Dall. 419. On the 11th of August, 1792, after the process was thus served on Mr. Randolph, the attorney-general of the United States, as counsel for the plaintiff, moved for a judgment by default on the fourth day of the next term, unless the State should then, after notice, show cause to the contrary. At the next term Mr. Ingersoll and Mr. Dallas presented a written remonstrance and protestation on behalf of the State against the exercise of jurisdiction, but in consequence of positive instructions they declined to argue the question. Mr. Randolph, thereupon, proceeded alone, and in opening his argument said: "I did not want the remonstrance of Georgia to satisfy me that the motion which I have made is unpopular. Before the remonstrance was read I had learnt from the acts of another State, whose will must always be dear to me, that she condemned it."

On the 19th of February, 1793, the judgment of the court was announced, and the jurisdiction sustained, four of the justices being in favor of granting the motion and one against it.

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As soon as the decision was announced, steps were taken to secure an amendment of the Constitution withdrawing jurisdiction.

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. . . . . soon after the next Congress came together, the eleventh amendment to the Constitution was proposed, and afterwards ratified by the requisite number of States, so as to go into effect on the 8th of January, 1789. That amendment is as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign State."

Under the operation of this amendment the actual owners of the bonds and coupons held by New Hampshire and New York are

precluded from prosecuting these suits in their own names. The real question, is, therefore, whether they can sue in the name of their respective States, after getting the consent of the State, or, to put it in another way, whether the State can allow the use of its name in such a suit for the benefit of one of its citizens.

The language of the amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted *by* citizens of one State against another State. No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons. In New Hampshire, before the Attorney General is authorized to begin a suit, the owner of the bond must deposit with him a sum of money sufficient to pay all costs and expenses. No compromise can be effected except with the consent of the owner of the claim. No money of the State can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the Attorney General such counsel as he chooses, the State being in no way responsible for fees. All moneys collected are to be kept by the Attorney General, as special trustee, separate and apart from the other moneys of the State, and paid over by him to the owner of the claim, after deducting all expenses incurred not before that time paid by the owner. The bill, although signed by the Attorney General, is also signed, and was evidently drawn, by the same counsel who prosecuted the suits for the bondholders in Louisiana, and it is manifested in many ways that both the State and the Attorney General are only nominal actors in the proceeding. The bond owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and if any money is ever collected, it must be paid to him without even passing through the form of getting into the treasury of the State.

In New York no special provision is made for compromise or the employment of additional counsel, but the bondholder is required to secure and pay all expenses and gets all the money that is recovered. This State, as well as New Hampshire, is nothing more nor less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them.

It is contended, however, that, notwithstanding the prohibition

of the amendment, the States may prosecute the suits, because as the "sovereign and trustee of its citizens," a State is "clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former." There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt, owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national power of levying war and making treaties. As was said in the *United States* v. *Diekelman*, 92 U. S. 520, if a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiations, or, if need be, by war."

All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of States in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, "enter into any agreement or compact with another State." Art. 1, sec. 10, cl. 3.

But it is said that, even if a State, as sovereign trustee for its citizens, did surrender to the national government its power of prosecuting the claims of its citizens against another State by force, it got in lieu the constitutional right of suit in the national courts.

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. . . . . Under the Constitution as it was originally construed, a citizen of one State could sue another State in the courts of the United States for himself and obtain the same relief his State could get for him if it should sue. Certainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant. In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect

remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations. It follows that when the amendment took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power taken away by the grant of the special remedy was restored by the amendment. The effect of the amendment was simply to revoke the new right that had been given, and leave the limitations to stand as they were. In the argument of the opinions filed by the several justices in the Chisholm case, there is not even an intimation that if the citizen could not sue his State could sue for him. The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens? Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and

The bill in each case is dismissed.

A citizen may not sue his own state in the United States courts. Hans v. Louisiana, 134 U. S. 1. But the fact that a state owns stock in a corporation will not prevent a suit by an individual in the United States courts against such corporation. United States Bank v. Planters Bank, 9 Wheaton 904; Bank of Kentucky v. Wister, 2 Peters 318; and a state may sue another state in the United States courts, South Dakota v. North Carolina, 192 U. S. 286.

V. Liability of Local Corporations.

Olmstead v. Mayor, 42 N. Y. Superior Court, 481; Koch v. Mayor, 152 N. Y. 72; Hadley v. Mayor, 33 N. Y. 603; Dolan v. Mayor, 68 N. Y. 274; Wardlane v. Mayor, 137 N. Y. 194; Gregory v. Mayor, 113 N. Y. 416; White v. Inhabitants of Levant, 78 Me. 568; County of Lancaster v. Fulton, 128 Pa. St. 48; Fitzsimmons v. Brooklyn, 102 N. Y. 536; McCahon v. Commissioners, 8 Kan. 437; O'Leary v. Board, 93 N. Y. 1 (*supra*); all cases of liability of local corporations in contract.

See also, Lorillard v. Town of Monroe, 11 N. Y. 392; Wilcox v. Chicago, 107 Ill. 334; Hill v. Boston, 122 Mass. 344; Detroit v. Bladseby, 21 Mich. 84; Hand v. Brookline, 126 Mass. 324, all cases of the liability of local corporations for the tortious acts of officers.

CHAPTER IX.

LIABILITY OF OFFICERS.

I. Criminal Liability.[1]

COMMONWEALTH V. COYLE.

Supreme Court of Pennsylvania. 1894.
160 Pa. St. 36.

Opinion by Mr. Justice McCollum, February 26, 1894.

James Coyle, appellant, Michael Seavers and John H. Rhoads were jointly indicted and tried for neglect of their duty as directors of the poor and of the house of employment for Cumberland County. A verdict of guilty was rendered by the jury, sentence was suspended as to Seavers and Rhoads on their payment of one-fourth of the costs, and Coyle was sentenced to pay a fine of one hundred dollars and three-fourths of the cost. The pith of the complaint against them was that they neglected to discharge a duty which in their official capacity they owed to Joseph N. Diller, a poor and infirm child, aged seven years, who was a legal charge upon the county of Cumberland, and that in consequence of their neglect, he died. . . . . It is manifest from the testimony that they did not exercise the care enjoined by the law, and that they were negligent in binding him to Lafferty, and in their failure to institute proceedings to cancel the indenture. We need not repeat or discuss the testimony descriptive of the neglect and cruelty to which the child was subjected. It is sufficient to say of it that in our opinion it fully sustained the charges made in the first and second counts of the indictment. . . . . The counsel for the Commonwealth agree with the counsel for the defendants that this case is not governed by the statute referred to, but the former maintain and the latter deny that the matters charged in the indictment constitute a common law misdemeanor.

We think the contention of the defendants that the common law does not hold them criminally liable for a wilful neglect or refusal to discharge their duties as directors is unsound. In Amer. & Eng. Ency. of Law, vol. 19, p. 504, the rule on this subject is stated thus: "The neglect or failure of a public officer to perform any

[1]Officers are liable as private individuals for the ordinary crimes. See, e. g., State v. Dierberger, 90 Mo. 369, *supra*.

duty which by law he is required to perform is an indictable offence even though no damage was caused by the default, and a mistake as to his powers or with relation to the facts of the case is no protection."

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. . . . . In Pennsylvania overseers of the poor have been indicted, convicted, and sentenced for a misdemeanor in office in selling the keeping of paupers by public vendue or outcry to the lowest bidder; 9 Pa. 48-9.

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The several specifications of error which complain of the admission of evidence of deprivation and cruelty after the 5th of September, 1891, and of the denial by the court of the defendant's motion to strike out such evidence, are not sustained. The evidence referred to showed a continuance of the ill usage.

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We are not able to discover in the remaining specifications anything which calls for the reversal of the judgment. The contention that the appellant cannot be prosecuted and punished for misdemeanor in office because his term has expired, is not supported by reason or authority, and certainly he ought not to complain, that, while he was liable for all the costs, he was required to pay only three-fourths of them.

The specifications are overruled and the judgment is affirmed.

Officers are often made criminally liable by statute. For an instance of such a liability see United States v. Germaine, 99 U. S. 508, *supra.*

The criminal liability of officers is often difficult of enforcement, owing to the powers possessed by the district attorney or other public prosecutor, who has control of the prosecution of all crimes including those committed by public officers. Thus it is the usual rule that counsel of private prosecutors may not participate in the prosecution except with the consent of the public prosecutor. In State v. Kent, 4 North Dakota 577. Sometimes, however, the local public prosecutor acts under the control of the Attorney General. Cf. State v. District Court, 22 Mon. 25.

The courts exercise a control over officers when officers have to resort to them to punish individuals for alleged violations of laws and ordinances. Instances of the exercise of such a control in this connection are: Overshiner v. State, 156 Ind. 187; Ransom v. Black, 54 N. J. L. 446; State v. Ferguson, 33 N. H. 424; Morris v. City of Columbus, 102 Ga. 792; City of Chicago v. Quinby, 38 Ill. 274; City of Clinton v. Phillips, 58 Ill. 102; Health Department, etc. v. Trinity Church, 145 N. Y. 32.

II. Civil Liability of Officers

A. On Contract.

1. Personal Liability.

BROWN V. BRADLEE.

Supreme Judicial Court of Massachusetts. February, 1892.
156 Mass. 28.

Contract for the amount of a reward.

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Holmes, J. This is an action to recover a reward which was offered in writing in the following terms:

"$2,500 reward will be paid to any person furnishing evidence that will lead to the arrest and conviction of the person who shot Mr. Edward Cunningham, November 21, 1889.

"J. Walter Bradlee,
T. Edwin Ruggles,
J. Albert Simpson.
Selectmen of Milton.

Milton, Nov. 22, 1889."

The main questions reserved by the report are really questions as to the construction of this instrument, namely, whether the defendants bound themselves personally by it, and what evidence would warrant a finding that the conditions of the offer were satisfied.

On the first question we are of opinion that the defendants are personally liable. No doubt the instrument would bind the town if made with authority and intent to bind it. *Crawshaw* v. *Roxbury*, 7 Gray, 374. *Janvrin* v. *Exeter*, 48 N. H. 83. But the same words may bind two parties; the agent, because in their literal sense they purport to bind him; the principal, because he is taken to have adopted the name of the agent as his own for the purpose of the contract. *Byington* v. *Simpson*, 134 Mass. 169. *Calder* v. *Dobell*, L. R. 6 C. P. 486. The purport of the words used in this case is that the promise contained in the body of the paper is made by the signer. The only question is, Who is the signer? Do the defendants, by adding their official designation, take away from their names their ordinary significance as proper names, and make of their collective signatures a composite unit, which means the

town of Milton and nothing else? We think not. But for the words, "Selectmen of Milton," the promise would be in the usual and proper form for a personal undertaking. *Wentworth* v. *Day*, 3 Met. 352; *Besse* v. *Dyer*, 9 Allen, 151; *Lancaster* v. *Walsh*, 4 M. & W. 16; *Lockhart* v. *Barnard* 14 M. & W. 674; *Thatcher* v. *England*, 3 C. B. 254; *Tarner* v. *Walker*, L. R. 1 Q. B. 641; L. R. 2 Q. B. 301. If it contained express words of personal promise, and the corporation was a private corporation, or the agents were not public officers, the mere addition of their office would not exonerate them. *Simonds* v. *Heard*, 23 Pick. 120, 125; *Fullam* v. *West Brookfield*, 9 Allen 1, 4; *Tucker Manuf. Co.* v. *Fairbanks*, 98 Mass. 101, 104. The only argument which can be relied on for a different conclusion here is that the defendants were public officers, and that a more liberal rule prevails with regard to them. It has been doubted how far there is such a difference with regard to agents or officers of a town; *Simonds* v. *Heard*, 23 Pick. 120, 124; *Hall* v. *Cockrell*, 28 Ala. 507; *Providence* v. *Miller*, 11 R. I. 272; and these cases show very plainly, if authority for the proposition is needed, that such officers will bind themselves personally if they purport to do so. As a test of what the defendants have purported to do by the literal meaning of their words, suppose that their offer had been under seal, we think it would have been impossible to say that the only meaning of the signature was the town of Milton. See *Codding* v. *Mansfield*, 7 Gray, 272, 273. Perhaps our conclusion is a little strengthened by the consideration that, so far as appears, the defendants had not authority to bind the town for more than $500. Pub. Sts. c. 212, § 12. For, although, of course, an agent does not make a promise his own by exceeding his authority, if it purports to bind his principal only (*Jefts* v. *York*, 4 Cush. 371) still, when the construction is doubtful, the fact that he has no authority to bind the supposed principal is a reason for reading his words as directed toward himself. *Hall* v. *Cockrell*, 28 Ala. 507, 512.

See also McCartle v. Bates, 29 Ohio St. 419, *supra*. The intention of an officer to make himself liable must be clear. Hodgson v. Dexter, 1 Cranch, 345; for the general rule is that the officer signing a public contract does not bind himself.

McCURDY V. ROGERS.

Supreme Court of Wisconsin. June, 1886.
21 Wisconsin 199.

DOWNER, J. The first question is: Did the county court err in instructing the jury "that if they found from the evidence that the defendant, as chairman of the board of supervisors of the town of Oshkosh, agreed to pay for said town to said Lent $300 for his credit, the contract was not binding on the town, and the defendant was liable therefor personally?" The town was authorized by law to pay only $200 bounty to each volunteer; and if the defendant, as agent of the town, promised to pay more than that sum, the promise was not binding on the town. The principle of the instruction is, therefore, that an agent who does not give a cause of action against his principal, is *of necessity* personally liable. This is generally so. Is it so in all cases? Is it so in this? Was there sufficient testimony to base the instruction upon?

It was held in *Smout* v. *Ilbery*, 10 Mees. & Wels., 1, that where the wife, acting as agent for her husband, had an original authority, which had been revoked by the death of the husband, unknown to her, she was not liable by reason of making a void contract in his name after his death. The well reasoned opinion of the court in that case leads to the conclusion, that to make any agent personally liable, where he does not intend to be, and the credit was not given to him, there must be *some wrong or omission of right* on his part, such as asserting he had authority when he knew or ought to have known he had not, or a failure to disclose fully all the facts within his knowledge. To the same effect is *Ogden* v. *Raymond*, 22 Conn. 384. See also Story on Agency, §§ 265, 287. It is not claimed that the appellant made any false representations to Lent, or practiced any deception upon him, unless it was done by making a promise in the name of the town which he had no authority to make. His assuming to make a contract which he had no authority to make would ordinarily in the case of private agents, be equivalent to a representation that he had authority to make it. But not so in this case; or if so, its falsity was known at the time to Lent. For the authority which the town had was by virtue of a general statute law, which both parties alike are presumed to know. A representation made by the

defendant to Lent, and at the time known by him to be false, of course could not be relied on by him, and could not be a wrong to the injury of Lent. The complaint is in assumpsit, and the instruction taken in connection with the complaint, assumes or is to the effect that if the defendant promised as agent for and in the name of the town, and promise is void as to the town for want of authority in the agent to make it, it became the individual promise of the agent, on which he was liable in this action. We do not see on principle how an agent can be liable on any contract, unless there are apt words to charge him; or how a promise on his part can be implied, unless the credit was given to him. The authorities are somewhat conflicting as to the liability of an agent in actions *ex contractu;* but the weight of authority we think is, that to charge an agent in such an action the credit must have been given to him, or there must be an express contract, and if there is a written contract there must be apt words in it to charge him. See Story on Agency, § 264a, and note; *Ogden* v. *Raymond,* 22 Conn., 384, and authorities there cited. If there are not apt words to charge the agent, and the credit is not given to him, then he is liabel only in an action *ex delicto.*

It is said that this leads or may lead in this action to the conclusion that no one is liable; for the town is not. This may be so. But we do not think, if it be so, that it affords us a sufficient ground for holding the defendant liable, unless his acts bring him within the principles we herein lay down. If the defendant had stipulated with Lent that he should not be personally liable, it is clear that, in the absence of fraud on his part, no personal liability would rest on him.

According to the authorities cited by the appellant's counsel, if he was chairman of the board of supervisors, the defendant was a public agent. The law raises a very strong presumption against any credit being given to a public agent acting within the scope of his authority. Why should a public agent in such a case be presumed to make himself personally liable, and trust to the government for remuneration, rather than a presumption be raised that the party with whom he is dealing was to trust the government? Both know the government is not bound; and if the party contracting with the agent desires him personally to be bound, it appears to us not unreasonable that he should so expressly stipulate.

The instruction was erroneous; because the defendant, if he acted as a public agent, was not *ex necessitate* liable by reason of

transcending his authority under the circumstances of this case, either in an action *ex contractu* or *ex delicto.*

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By the Court.—Judgment of the county court reversed, and a *venire de novo* awarded.

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2. Contracts Relative to Offices.

ROBERTSON V. ROBINSON.

Supreme Court of Alabama. December, 1880.

65 Alabama 610.

BRICKELL, C. J. . . . . All agreements or contracts having for their object that which is repugnant to public justice, or violative of public policy, or offensive to good morals, or contrary to statutory provisions, or in derogation of the principles of the common law relating to the public peace or security, and injurious to the community, are void: "and the reason why the common law says such contracts are void, is for the public good." The agreement between Sewell and appellant, it is insisted, falls within this general principle, because, in fact, it was a sale of the office or employment of deputy assessor of the county of Montgomery. Whether this is the real character of the agreement, and, if it be, whether it is offensive to law, and violative of public policy, requires that the whole transaction should be inquired into and considered. The form of the agreement, and the expressions embodied in the writing to which it was reduced are only matters of evidence, not operating an estoppel upon the parties, and not embarrassing or hindering the court. If it were otherwise—if the manner of the transaction could *gild over and conceal the truth,* this great conservative principle of the law, essential to the purity of the administration of justice, of public morals, and of the general welfare, would be evaded at the pleasure of the designing, the wicked and the corrupt.

The county assessor of taxes is a public officer, elected by the qualified voters of the county, commissioned by the governor, required to take the oath of office prescribed by the constitution to be taken by all public officers, the highest or lowest, and charged

with duties of great importance to the public and to the citizen—duties not only ministerial, but in their nature in some respects, judicial. He has authority to appoint deputies, whose acts have the force and effect of his official acts, and for whose good conduct he is responsible.—Code of 1876, § 397. The deputy appointed by him, not for a mere particular case, or for a mere casual, special service, is required to take the constitutional oath of office. The statute authorizing his appointment, requiring him to take the oath of office, distinguishing between him and one whom the assessor may appoint to a special service, places him, in many respects as a public officer.

The transaction between Sewell and the appellant had its origin on the day of, and pending the election of tax-assessor for the county of Montgomery, in November, 1874. It commenced by a proposition made by Sewell to the appellant, in substance, that if Sewell, who was a candidate for tax-assessor, was successful, he would appoint the appellant his chief deputy, and pay him from the fees and perquisites of the office twenty-five hundred dollars annually, if the appellant would make for him his official bond, and perform all the duties of the office, except such as related to the assessment of the poll-tax. The proposition was accepted, and it is this agreement the subsequent writing was intended to embody, and which the parties treated as embodying.

Of such an agreement in the strong language of Chief Justice WILMOT, in *Collins* v. *Blantern*, 2 Wils. 241 (1 Smith's L. C. Pt. 2, 673), it may be said, that it "is void *ab initio*, by the common law, by the civil law, moral law, and all laws whatever." It concerns a place of public trust, in which the public have high interests, involving the performance of public duties, and which cannot be made the subject of traffic, and can not become the matter of trade and bargaining. It was corrupting the appellant as a voter, bound by his duty to cast his vote from public, not private considerations, on the eve of the election to make such a proposition; tempting him to merge his duty as a citizen in the promptings of mere selfishness, in the gratification of his avarice. It was bargaining away the discretion in the appointment of a deputy which Sewell was bound to exercise for the public good, and not for the promotion of his private interest or convenience. It was an irrevocable appointment, continuing during the term of office, which was contemplated, fettering the power of appointment with which Sewell was clothed by law. In fact, it was a sale of the office of deputy, and the consideration was not only the service the appel-

lant was expected to render, but the making of the official bond. The people of Montgomery county, trusting to the integrity and good judgment of Sewell, elected him to the office of assessor of taxes. Their confidence was repaid by his transfer to the appellant of every duty not merely ministerial, attaching to the office, in consideration really of ease and convenience in making the official bond. It would be far better that public trusts, public offices, or the deputations to them, should be exposed at public auction to the highest, or to the lowest bidder, than that they should become the subject of such private bargaining and traffic. We cite numerous authorities, which it is unnecessary to review specially, and in which the bargaining away of public offices, or of deputations to them, have been pronounced void.—2 Chit. Contr. 990; 1 Addison Contr. 262, 266; *Hanington* v. *Duchatell,* 1 Brown's C. C. 124; *Morris* v. *McCulloch,* Ambler, 455; *Lee* v. *Coleshill,* Cro. Eliz. 529; *Garforth* v. *Fearon,* 1 H. Black, 328; *Godolphin* v. *Tudor,* 2 Salk. 468; *Greenville* v. *Atkins,* 9 B. & C. 462; *Tappan* v. *Brown,* 9 Wend. 175; *Gray* v. *Hook,* 4 Conn. 449; *Haralson* v. *Dickens* N. C. L. R. 66; *Grant* v. *McLester,* 8 Geo. 553; *Lewis* v. *Knox,* 2 Bibb. 453; *Outon* v. *Rodes,* 3 A. K. Marsh, 453.

No judicial tribunal, so far as we can discover, has ever given countenance to any such agreement; and if popular elections are to be kept free from the taint of selfishness and corruption—if public offices are to be dignified as public trusts, and the performance of official duty preserved from the contamination of unlawful and improper influences, all such agreements will be condemned.

The validity of the agreement was the only question presented to, and decided by the City Court, and the manner of presenting it was a matter of agreement between the parties. The court did not err in pronouncing the agreement void, and its judgment is

Affirmed.

STOUT V. ENNIS.

Supreme Court of Kansas. July, 1882.
28 Kansas 706.

December 12, 1881, the plaintiff filed the following petition in the district court of Harvey county, to wit:

"The plaintiff, B. F. Stout, complains of the defendant, H. L. Ennis, and for cause of action says:

"That during the year 1878, the plaintiff was auditor of the

county of Henry, in the state of Ohio; that the defendant was a candidate in the democratic party for the nomination for that office, and that the defendant then and there agreed that if the plaintiff would support him for the nomination and not be a candidate for the same office himself, he, the said defendant, would, if nominated and elected, to the said office, employ this plaintiff as his deputy and clerk during the term of said office.

"That the defendant was nominated and elected, and duly qualified as said auditor, and did thereupon enter into and make a contract with the plaintiff by the terms of which he agreed to make this plaintiff his deputy and clerk for the term of three years, for which he promised and agreed to pay the plaintiff one-half of the net salary and fees of said office.

"That afterwards, to wit, on the —— day of ————, 1878, the defendant being desirous of rescinding his said contract, proposed to this plaintiff that if he, plaintiff, would agree to and would rescind said contract, he the defendant, would pay him the sum of $700 as stipulated damages, at the time and in the manner following, to wit: $100 November 20, 1879; $200 November 20, 1880; and $400 November 20, 1881. The plaintiff thereupon and in consideration of said sum of $700 so as aforesaid to be paid, agreed to and did rescind said contract; and that thereupon the defendant executed and delivered to L. L. Orwig, as trustee for this plaintiff, the following instrument in writing, to wit:

" 'For a valuable consideration, I hereby agree to pay L. L. Orwig, for the benefit of B. F. Stout, $700, as follows: $100 in one year from date; $200 two years from date; $400 three years from date, and the last specified sum to bear interest at the rate of six per cent. per annum from date.

" 'This agreement to be void at the death of either Stout or Ennis.

" 'November 20, 1878.—Napoleon, Ohio. H. L. Ennis.'

"That a copy of said contract is hereto attached, marked 'Exhibit A,' showing the erasures thereon; that defendant has made the following payments on the same, to wit, $100 one year from date, $200 two years from date. That said payments were made when due, and the defendant obliterated the words at the times of making payments by various marks made thereon by him with pen and ink.

"That defendant, though often requested, has refused and still refuses to pay the said sum of $400, last due as above set forth, or any part thereof.

"That plaintiff and defendant were at the times herein referred to both members of the same political party, and in every way fully qualified to perform the duties of the office of auditor.

"That by reason of the foregoing plaintiff is entitled to recover of the defendant the said sum of $400, with interest thereon at six per cent. per annum from the 20th day of November, 1878.

"Wherefore plaintiff, B. F. Stout, prays judgment against said defendant, H. L. Ennis, for the sum of $400, and interest thereon at six per cent. per annum from November 20, 1878, and for costs of this action."

The defendant demurred to this petition, upon the ground that it did not state facts sufficient to constitute a cause of action, and the court below sustained the demurrer and rendered judgment for costs against the plaintiff; and to reverse such ruling and judgment, the plaintiff has filed his petition in error in this court.

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VALENTINE, J. This action was brought by B. F. Stout against H. L. Ennis, to recover the sum of $400, alleged to be due on the following instrument in writing, to wit:

"For a valuable consideration, I hereby agree to pay to L. L. Orwig, for the benefit of B. F. Stout, $700 as follows: $100 one year from date; $200 two years from date; $400 three years from date, and the last specified sum to bear interest at the rate of six per cent. per annum from date.

This agreement to be void at the death of either Stout or Ennis.—November 20, 1878.—Napoleon, Ohio.

H. L. Ennis."

The sole question involved in this case is, whether this instrument in writing is valid or not. *Prima facie*, it is legal and valid, and founded upon a sufficient consideration; and before we can hold that it is illegal or invalid or not founded upon a sufficient consideration, its illegality or invalidity or insufficiency of consideration must be made to affirmatively appear by something outside of the instrument itself, something extrinsic thereto. Is there anything in the case showing affirmatively that this instrument is not legal, or not valid, or not founded upon a sufficient consideration?

It appears from the petition in the case that the plaintiff and defendant entered into three separate contracts, at three different times. The first contract was, in substance, that if the plaintiff would support the defendant for nomination and election to the office of auditor of Henry county, Ohio, that the defendant would,

if nominated and elected to such office, employ the plaintiff as his deputy during the term of such office. Such a contract was of course illegal and void, being in contravention of public policy.

The second contract was made after the election, and after the defendant had been both nominated and elected to such office. This contract was, in substance, that the defendant would employ the plaintiff as his deputy for the term of three years, and would pay to the plaintiff for his services one-half of the net salary and fees of the office. Now this contract is not necessarily illegal or void. It was not a sale or a "farming" of the office within the meaning of the decision of the case of *Outon* v. *Rodes*, 3 A. K. Marshall (Ky.), 432; 13 Am. Dec. 193. There is no pretense that the defendant was to abandon the office, or to give it up to the plaintiff. The contract was simply an agreement to employ the plaintiff as a deputy, and to give him a portion of the fees and salary as compensation. The defendant would of course still retain the possession and control of the office, and the plaintiff would have nothing to do but to perform the ordinary duties of a deputy. There is nothing inhering in the contract itself that would render it illegal or void. The defendant, however, claims it is void for two reasons: First, that it is founded upon the original and illegal contract made prior to the defendant's nomination and election; and second, that it is void on account of the sixth section of the statute for the prevention of frauds and perjuries. (Comp. Laws of 1879, p. 464, sec. 6). Now it is not shown that the second contract was founded upon the first illegal contract, nor is it shown that it has any necessary connection therewith. It is not even shown that one was the inducement for the other. Each might have a separate and independent existence, and either might exist if the other had never been made. We do not think that the first necessarily vitiates the second; and it is certainly not shown that the first has such a necessary connection with the second as to vitiate it.

As to the question with reference to the statute of frauds and perjuries, we would say, that this contract was made in Ohio, and not in Kansas; and it is not shown what the provisions of the statutes regarding this subject are in Ohio. Of course, the statutes of Kansas cannot vitiate a contract made in Ohio. The contract may have been valid in Ohio, notwithstanding the statutes of Kansas. But suppose they have the same kind of statutes in Ohio for the government of this class of cases as we have in Kansas; then will the statutes in either state, or in both combined, render

this second contract void? We think not. The statute referred to by the defendant does not purport to render such contracts void. The statute, so far as it may be supposed to have any application to this case, provides that "no action shall be brought whereby to charge a party . . . . upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

It is claimed that this second contract is void because it was not to be performed within one year, and was [not] in writing. Now there is nothing appearing in the case that shows that it was not in writing; and, as we have before stated, unless it be made to affirmatively appear that the contract sued on was illegal or void (it being *prima facie* valid), the contract sued on cannot be held to be void. Besides, when a contract is pleaded, it will usually be held to be valid, unless it affirmatively appears on the face of the contract, or by allegations in the pleading, to be invalid. But, as we have said before, the statute does not attempt to make the second contract either illegal or void, even if it was not to be performed within one year and was not in writing. All that the statute attempts with reference to this subject, is simply to enact that no such action shall be brought on such a contract. The statute leaves the contract valid for all other purposes, unless it is void for some other reason than merely that it is not to be performed within one year and is not in writing. (*McCampbell* v. *McCampbell*, 5 Littell (Ky.) 92). Such a contract is valid for all purposes except for the mere purpose of suing thereon. It is valid, for instance, as a consideration for some other contract. Now in the present case the plaintiff did not sue upon this second contract. He sued upon the third contract which was "in writing, and signed by the party to be charged therewith." It will be seen that the statute of frauds and perjuries has really nothing to do with this case.

The third contract, and the one sued upon in this case, appears to be valid in every respect, and, as we think, there is nothing outside of it and nothing in the record showing it to be invalid. It is true that the rescission of the second contract is the foundation, the basis, and the consideration for the third contract; but while it is possible that the second contract is void for the purpose of commencing an action upon it, yet it is valid for the purpose

of making it a consideration for the third contract. The third contract, we think, is valid—or at least it is *prima facie* valid; and there being nothing in the case showing it to be void, it must be held to be valid. The authorities will be found cited in the briefs of counsel.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

All the justices concurring.

B. IN TORT.

1. Liability for Duties Owed Only to Public.

SOUTH ET AL. V. STATE OF MARYLAND.

Supreme Court of the United States. December, 1855.

18 How. 396.

Mr. Justice GRIER delivered the opinion of the court.

In this case a judgment was rendered for the plaintiff in the court below, and the defendant moved, in arrest of judgment, "that the matters set out in the declaration of the plaintiff are not sufficient, in law, to support the action." If it be found that the court erred in overruling this motion and in entering judgment on the verdict, a consideration of the other points raised on the trial will be unnecessary.

The action is brought on the official bond of South, as sheriff of Washington county. The declaration sets forth the condition of the bond at length. The breach alleged is, in substance, "that while Pottle was engaged about his lawful business, certain evil-disposed persons came about him, hindered and prevented him, threatened his life, with force of arms demanded of him a large sum of money, and imprisoned and detained him for the space of four days, and until he paid them the sum of $2,500 for his enlargement."

That South, the sheriff, being present, the plaintiff, Pottle, applied to him for protection, and requested him to keep the peace of the state of Maryland, he, the said sheriff, having power and authority so to do. That the sheriff neglected and refused to protect and defend the plaintiff, and to keep the peace, wherefore, it is charged "the sheriff did not well and truly execute and perform

the duties required of him by the laws of said state;" and thereby the said writing obligatory became forfeited, and action accrued to the plaintiff.

This declaration does not charge the sheriff with a breach of his duty in the execution of any writ or process in which Pottle, the real plaintiff in this case, was personally interested, but a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury from the unlawful violence of a mob. It assumes as a postulate, that every breach or neglect of a duty subjects the officer to a civil suit by any individual who, in consequence thereof, has suffered loss or injury; and consequently, that the sheriff and his sureties are liable to this suit on his bond, because he has not "executed and performed all the duties required of and imposed on him by the laws of the state."

The powers and duties of the sheriff are usually arranged under four distinct classes:

1. In his judicial capacity he formerly held the sheriff's tourn, or county courts, and performed other functions which need not be enumerated.

2. As king's bailiff, he seized to the king's use all escheats, forfeitures, waifs, wrecks, estrays, etc.

3. As conservator of the peace in his county or bailiwick, he is the representative of the king, or sovereign power of the state for that purpose. He has the care of the county, and, though forbidden by *magna charta* to act as a justice of the peace in trial of criminal cases, he exercises all the authority of that office where the public peace was concerned. He may upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it; he may award process of the peace, and bind anyone in recognizance to keep it. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody. For these purposes he may command the *posse comitatus* or power of the county; and this summons, every one over the age of fifteen years is bound to obey, under pain of fine and imprisonment.

4. In his ministerial capacity he is bound to execute all processes issuing from the courts of justice. He is keeper of the county jail, and answerable for the safe-keeping of prisoners. He summons and returns juries, arrests, imprisons, and executes the sentence of the court, etc., etc. 1 Black. Com. 343; 2 Hawk. P. C. C. 8, S 4, etc., etc.

Originally the office of sheriff could be held by none but men of large estate, who were able to support the retinue of followers which the dignity of his office required, and to answer in damages to those who were injured by his neglect of duty in the performance of his ministerial functions. In more modern times, a bond with sureties supplies the place of personal wealth. The object of these bonds is security, not the imposition of liabilities upon the sheriff, to which he was not subject at common law. The specific enumeration of duties in the bond in this case includes none but those that are classed as ministerial. The general expression, in conclusion, should be construed to include only such other duties of the same kind as were not specially enumerated. To entitle a citizen to sue on this bond to his own use, he must show such a default as would entitle him to recover against the sheriff in an action on the case. When the sheriff is punishable by indictment as for a misdemeanor, in cases of a breach of some public duty, his sureties are not bound to suffer in his place, or to indemnify individuals for the consequences of such a criminal neglect.

It is an undisputed principle of the common law, that for a breach of a public duty, an officer is punishable by indictment; but where he acts ministerially. and is bound to render certain services to individuals, for a compensation in fees or salary, he is liable for acts of misfeasance or nonfeasance to the party who is injured by them.

The powers and duty of conservator of the peace exercised by the sheriffs are not strictly judicial; but he may be said to act as the chief magistrate of his county, wielding the executive power for the preservation of the public peace. It is a public duty, for neglect of which he is amenable to the public, and punishable by indictment only.

The history of the law for centuries proves this to be the case. Actions against the sheriff for breach of his ministerial duties in the execution of process are to be found in almost every book of reports. But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace, by those who have suffered injury to their property or persons through the violence of mobs, riots or insurrections.

In the case of *Entick* v. *Carrington,* State Trials, vol. 19, page 1062, Lord Camden remarks: "No man ever heard of an action against a conservator of the peace as such."

The case of *Ashby* v. *White,* 2 Lord Raym. 938, has been often

quoted to show that a sheriff may be liable to a civil action where he has acted in a judicial, rather than a ministerial capacity. This was an action brought by a citizen entitled to vote for member of parliament, against the sheriff for refusing his vote at an election. Gould, justice, thought the action would not lie, because the sheriff acted as a judge. Powis, because, though not strictly a judge, he acted *quasi* judicially. But Holt, C. J., decided that the action would lie: 1. "Because the plaintiff had a right or privilege. 2. That, by the act of the officer, he was hindered from the enjoyment of it." 3. By the finding of the jury the act was done maliciously. The later cases all concur in the doctrine that where the officer is held liable to a civil action for acts not simply ministerial, the plaintiff must allege and prove each of these propositions. See *Cullen* v. *Morris*, 2 Starkie, N. P. C.; *Harman* v. *Tappenden*, 1 East, 555, etc.

The declaration in the case before us is clearly not within the principles of these decisions. It alleges no special individual right, privilege or franchise in the plaintiff, from the enjoyment of which he has been restrained or hindered by the malicious act of the sheriff; nor does it charge him with any misfeasance or nonfeasance in his ministerial capacity, in the execution of any process in which the plaintiff was concerned. Consequently we are of opinion that the declaration sets forth no sufficient cause of action.

The judgment of the circuit court is therefore reversed.

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2. Liability of Officers not Ministerial.

BRADLEY V. FISHER.

Supreme Court of the United States. December, 1871.

13 Wall. 335.

This was an action brought by Joseph H. Bradley, who was, in 1867, an attorney-at-law, practicing in the Supreme Court of the District of Columbia, against George P. Fisher, who was then one of the justices of that court, to recover damages alleged to have been sustained by the plaintiff "by reason of the wilful, malicious, oppressive and tyrannical acts and conduct" of the defendant, whereby the plaintiff was deprived of his right to practice as an attorney in that court.

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Mr. Justice FIELD delivered the opinion of the court.

In 1867 the plaintiff was a member of the bar of the Supreme Court of the District of Columbia, and the defendant was one of the justices of that court. In June, of that year, the trial of one John H. Suratt, for the murder of Abraham Lincoln, was commenced in the Criminal Court of the District, and was continued until the tenth of the following August, when the jury were discharged in consequence of their inability to agree upon a verdict. The defendant held that court, presiding at the trial of Suratt from its commencement to its close, and the plaintiff was one of the attorneys who defended the prisoner. Immediately upon the discharge of the jury, the court, thus held by the defendant, directed an order to be entered on its records striking the name of the plaintiff from the roll of attorneys practicing in that court. The order was accompanied by a recital that on the second of July preceding, during the progress of the trial of Suratt, immediately after the court had taken a recess for the day, as the presiding judge was descending from the bench, he had been accosted in a rude and insulting manner by the plaintiff, charging him with having offered the plaintiff a series of insults from the bench from the commencement of the trial; that the judge had then disclaimed any intention of passing any insult whatever, and had assured the plaintiff that he entertained for him no other feelings than those of respect, but that the plaintiff, so far from accepting this explanation, or disclaimer, had threatened the judge with personal chastisement.

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The plea, as will be seen from our statement of it, ... sets up that the order for the entry of which the suit is brought, was a judicial act done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which

no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, "a deep root in the common law."

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In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. In some states they may be thus suspended or removed without impeachment, by a vote of the two houses of the legislature.

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. . . . Judges of courts of superor or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is an usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily

known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil actions for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons.

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The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.

If, now, we apply the principles thus stated, the question presented in this case is one of easy solution.

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The Criminal Court of the District erred in not citing the plaintiff, before making the order striking his name from the roll of its attorneys, to show cause why such order should not be made for the offensive language and conduct stated, and affording him opportunity for explanation, or defense, or apology. But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.

We find no error in the rulings of the court below, and its judgment must, therefore, be affirmed, and it is so ordered.

Judgment affirmed.

Mr. Justice DAVIS, with whom concurred Mr. Justice CLIFFORD, dissenting.

SPALDING V. VILAS.

Supreme Court of the United States. October, 1895.

161 U. S. 483.

Mr. Justice HARLAN delivered the opinion of the court.

We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interest of the people requires that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a department, it is clear—and the present case re-

quires nothing more to be determined—that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for, personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of an inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as Postmaster General. The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purpose of the trial, that the defendant acted maliciously, that could not change the law.

The judgment of the Supreme Court of the District of Columbia is *Affirmed.*

JONES V. LOVING.

Supreme Court of Mississippi. October, 1877.

55 Mississippi 109.

CHALMERS, J., delivered the opinion of the court.

The plaintiff, late mayor of the town of Beauregard, brings this suit against the defendants, late aldermen of said town, to recover from them, individually, damages alleged to have been sustained by him from the passage by them of an ordinance which,

as he alleges, "unlawfully and maliciously deprived him of his legal rights, fees, privileges, and emoluments, and of his office of mayor as aforesaid."

It is impossible to perceive upon what theory such a suit can be maintained. If the ordinance was within the authority of the board, certainly the individual members of it cannot be made personally liable for a mistaken exercise of their powers; nor is it possible in such a case to inquire into the motives which prompted their action. By the 3d section of the Charter of the town, the board are constituted a legislative body, and given power "to make all needful laws and ordinances for the good government of said town and its inhabitants."

It certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable, upon an allegation that they acted maliciously towards the person aggrieved by the passage of the law. Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use. I am. Ld. Cas. side p. 653; *County Comrs.* v. *Ducket,* 20 Md. 469; *Borough of Freeport* v. *Marks,* 9 Pa. St. 253.

If, on the contrary, the aldermen of the town of Beauregard exceeded the measure of their authority in passing the ordinance in question, it was a mere *brutum fulmen,* and could not for one moment have deprived the plaintiff of any of the privileges, emoluments, or fees of his office. If he chose voluntarily to yield obedience to a void law, it was his own folly, for which the courts can afford him no relief by awarding damages against the individuals voting for the ordinance.

Judgment sustaining demurrer to declaration affirmed.

COFFIN V. COFFIN.

Supreme Judicial Court of Massachusetts. March, 1808.
4 Massachusetts 1.

PARSONS, C. J. The plaintiff has commenced an action of the case, demanding damages of the defendant for an injury to his character committed by the defendant in maliciously uttering and publishing defamatory words, which imported that the plaintiff had committed felony by robbing the Nantucket bank.

To this demand the defendant pleaded not guilty, and also, by leave of the court, a special plea in bar, justifying the speaking of the words, because, as he alleged, at the time when they were spoken, he and Benjamin Russell were members of the house of representatives then in session, and that he spoke the words to Russell, in deliberation in the house, concerning the appointment of a notary public, and that the words had relation to the subject of their deliberation.

The plaintiff, in his replication, denies these allegations; and avers that the words were spoken by the defendant of his own wrong, and without such cause as he had alleged, and tenders an issue to the country. The defendant does not demur to the replication, but joins the issue thus tendered.

Both the issues came on to trial, and it appeared from the evidence that when the words were spoken, the defendant and Russell were members of the house of representatives, then in session. The occasion, manner and circumstances of speaking them are thus related by Russell, the witness. He having some acquaintance with the plaintiff, and thinking highly of his integrity, was applied to by him to move a resolution for the appointment of an additional notary for Nantucket, the town represented by the defendant. Russell made the motion, and had leave to lay the resolution on the table. The defendant, in his place, inquired where Russell had the information of the facts, on which the resolution was moved. The witness answered, from a respectable gentleman from Nantucket. The resolution then passed, and the speaker took up some other business. Russell then left his place, and was standing in the passage-way, within the room, conversing with several gentlemen. The defendant, leaving his place, came over to Russell, and asked him who was the respectable gentleman, from whom he had received the information he had communicated to the house; Russell answered carelessly, he was perhaps one of his relations, and named Coffin, as most of the Nantucket people were of that name. The witness then, perceiving the plaintiff sitting behind the bar, pointed to him, and informed the defendant he was the man. The defendant looked towards him and said, "what, that convict?" Russell surprised at the question, asked the defendant what he meant, replied, "Don't thee know the business of Nantucket bank?" Witness said, "yes, but he was honourably acquitted." The defendant then said, "that did not make him less guilty, thee knows." It further appears that this conversation passed a little before one o'clock, that the election of notaries was not then before

the house, but was made that afternoon, or the next day, and that the plaintiff was not a candidate for that office. And there is no evidence that the resolution laid on the table by Russell, and passed, or the subject matter of it, was ever after called up in the house.

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The twenty-first article of the declaration of rights declares that "the freedom of deliberation, speech and debate in either house of the legislature is so essential to the rights of the people, that it cannot be the foundation of any accusation, or prosecution, action or complaint in any other court or place whatsoever." On this article the defendant relies for his justification. . . . .

In considering this article, it appears to me that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. In this respect the privilege here secured resembles other privileges attached to each member by another part of the constitution, by which he is exempted from arrests on *mesne* (or original) process, during his going to, returning from, or attending the general court. Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature.

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office, without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution of the office; and I would define the article, as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office; without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am

satisfied that there are cases, in which he is entitled to this privilege, when not within the walls of the representatives' chamber.

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Was Coffin, the defendant, in speaking the defamatory words, executing the duties of his office? Or, in other language, was he acting as a representative? If he was, he is entitled to the privilege he claims. If he was not, but was acting as a private citizen, as a private citizen he must answer.

Upon information given by the plaintiff to Russell, a member, he had moved a resolution providing for the choice of another notary for Nantucket; and on Russell's stating that his information was from a respectable person from that place, the resolution had passed; the house had proceeded to other business; and the subject matter of the resolution, or of the information, was not in fact before the house; although it is certain that any member might have moved to rescind the resolution. Russell, his brother member, was in the passage way, conversing with several gentlemen; the defendant came to him, and enquired the name of Russell's informant, who, he had declared, was a respectable gentleman from Nantucket. Was this enquiry, thus made, the act of a representative, discharging his duty, or of a private citizen, to gratify his curiosity? It was the former, say the defendant's counsel. Whether it was or not, certainly it was innocent. But to pursue the evidence, the defendant was answered; whatever was his motive, he had received the information. If upon it, he intended again to call up the resolution, he might have done it. But no motion, for that purpose, was ever made. He then utters to Russell the defamatory words. What part of his legislative duty was he now performing? It is said that he might apprehend that the plaintiff was a candidate for the office of notary; and that his motive might be to dissuade Russell from giving him his vote. But there is no evidence that the defendant supposed the plaintiff to be a candidate, and it is in evidence that the plaintiff was not a candidate. It is also apparent that the defendant believed that Russell was not ignorant of the indictment against the plaintiff, and of his acquittal. I cannot therefore assign to the defendant any other motive for his indiscreet language, but to correct Russell for giving to the plaintiff the appellation of a respectable gentleman; and to justify the correction, by asserting that an honourable acquittal, by the verdict of a jury, is not evidence of innocence. It is not therefore possible for me to presume that the defendant, in using, thus publicly, the defamatory words, even

contemplated that he was in the discharge of any official duty. . . . .

And I do consider a representative holden to answer for defamatory words, spoken maliciously, and not in discharging the functions of his office. But to consider every malicious slander, uttered by a citizen, who is a representative, as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege further than was intended by the people, or than is consistent with sound policy; and would render the representatives' chamber a sanctuary for calumny; an effect, which never has been, and, I confidently trust, never will be endured by any house of representatives of Massachusetts.

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Extreme cases of the abuse of power, either in the house of representatives, or in this court, may be imagined; but they are not to be argued from, to influence legal decisions.

Since the argument of this cause, I have examined the subject with as much attention as I have been able to give to it, amidst all the business of the court pressing on us, with a strong disposition to guard the privileges of the house, and of its members, because their privileges are essential to the rights of the people, and ought to be supported, by every good citizen, according to their true limits.

From this examination I am satisfied that, whatever may be our decision of the question, it is within our jurisdiction thus brought before us; and that no breach of the privileges of the house, or a conflict with its jurisdiction can result from our determination.

I am convinced, after much consideration, that the facts presented by the case do not entitle the defendant to the privilege, which he claims; and that, for this cause, the verdict ought not to be set aside.

Under this impression, to give a different opinion would be a desertion of a solemn duty, and a gross prevarication with my own conscience.

In this opinion of the Chief Justice, the other Judges, viz., SEDGWICK, SEWALL, THATCHER and PARKER, severally declared their full and entire concurrence.

GOODWIN V. GUILD.

Supreme Court of Tennessee. March 1, 1895.

94 Tenn. 486.

WILKES, J. This is an action for false imprisonment and malicious prosecution. It was tried before a special judge in the court below without the intervention of a jury, and a judgment rendered for $1,500—$1,000 of which were awarded as actual and $500 as exemplary damages—and defendant has appealed, and assigned many errors, which need not be treated in detail.

A short statement of the facts in the case is that plaintiff entered into a contract with the Board of Public Works and Affairs to construct a sewer in the city of Nashville. This contract, while dated April 14, 1892, appears to have been executed on the part of the board on April 18, 1892, and was in pursuance of a public letting to the lowest responsible bidder had before that date, and about April 2, 1892. The plaintiff secured the contract and expected and intended to use convict labor in its execution; and there is proof tending to show that this fact was known to the Board of Public Works and Affairs at the time the contract was let to the lowest bidder. After the public letting on the 2d of April, the Mayor and City Council of Nashville, on the 14th day of April, 1892, passed an ordinance making it unlawful for any person to use or employ convict labor on any work to be executed under contract with the city of Nashville, under a penalty of $50 for each violation. Defendant Guild was Mayor of Nashville, and, being notified that plaintiff was using convicts upon the work under his contract with the city, on April 23, 1892, went before the Recorder, and procured Mr. Cleary, Street Observer, to make the necessary affidavit that plaintiff was violating the city ordinance by working convicts in the city limits under his contract; and thereupon the Recorder and Judge of the City Court, at the suggestion of the said Guild, issued a warrant for plaintiff's arrest, which was given to a member of the police force, who met the plaintiff, read the warrant to him, and cited him to appear before the Recorder on the next morning, which he agreed to do. No actual arrest was made by touching the plaintiff or taking him into custody, and no bond for his appearance was required. He did appear, was fined $50, and appealed to the Circuit Court, and was in that court tried and acquitted December 15, 1892, on the ground that the city ordinance was in contravention of an Act of

the General Assembly, and hence was void, and gave no authority for plaintiff's arrest. Thereupon, November 16, 1893, plaintiff brought this action for damages for false imprisonment and malicious prosecution against the defendant personally, and against the members of the Board of Public Works individually, and the Mayor and City Council of Nashville. On demurrer, the action as to the Mayor and City Council was dismissed. The cause was tried and resulted in the acquittal of the members of the Board of Public Works, and in judgment against the defendant, Guild, as before stated.

It is conceded that the ordinance of the city under which the mayor proceeded was in contravention of law, and was, therefore, void, but at the time these proceedings were taken, it had not been so declared by any judicial tribunal, and defendant insists that he acted in perfect good faith in attempting to execute the ordinance as it was passed and stood upon the books of the city, and was actuated by no malice. The Circuit Judge, in his written opinion, found that the defendant was actuated by no feelings of malice.

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. . . . It does not appear that he took any part in the proceedings after they were first instituted, but merely set on foot the proceedings to test and execute the ordinance. It is evident that this void ordinance could not justify the arrest of the plaintiff and his prosecution, still, it was the duty of the mayor, as the chief executive of the city, to see its ordinances enforced, and, so long as he acted in good faith, and with no malice or improper motive, he cannot be held personally liable for a mere error in judgment. If he took advantage of his official position to oppress the plaintiff, either from ill will towards him, or because of any other improper motive, he would be liable.

The doctrine is tersely stated in *Kendall* v. *Stokes*, 3 How. (U. S.) 87, 98, by Chief Justice Taney, in these words: "A public officer is not liable to an action if he falls into an error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion, even though an individual may suffer by his mistake."

In Bishop on Noncontract Law, Sec. 787, it is said: "By the express or implied terms of an officer's authority, he is to act honestly, carefully, and after the dictates of his own judgment, which, of necessity, being a human judgment, may err. Therefore, when he has done what is thus commanded, whether the re-

sult is correct or not, he has exactly discharged his duty, and the law which compelled this of him will protect him, whatever harm may have befallen individuals."

In 14 Amer. & Eng. Enc. of Law, p. 41, it is held that "public officers, called upon to act officially, may be held liable for a malicious prosecution on the same grounds as other persons. But malice and want of probable cause ought very clearly to appear in such case. The presumption being strongly in their favor, mere ignorance of the law, or overpersuasion by others, is not sufficient." While we would not be understood as going to this latter length, still it will not do to apply the same strict rules of liability to an executive officer, whose duty it is to see the laws executed, if he makes a mistake in judgment that would be applied to an individual who has no public duty to perform in execution of its laws. To hold this strict rule would paralyze the arm of every executive and peace officer; and while such officer, for any wanton or malicious abuse of legal process which is set on foot for the oppression of a citizen, must be held liable to the same or possibly to a greater extent than a private individual, still there must be undoubted evidence of malice, oppression or wanton prosecution, with the absence of all probable cause or excuse, to hold a public officer liable for errors in the execution of his duties.

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For these reasons the judgment of the court below is reversed, and the cause dismissed at plaintiff's cost.

But an act is not discretionary simply because its performance requires the ascertainment of the existence of facts the existence of which is necessary in order that the act may legally be performed. If the existence of such facts is necessary to the exercise of jurisdiction a mistaken determination that they exist will not relieve from liability. Mygatt v. Washburn, 15 N. Y. 316, *supra*, officers are also held liable for a gross abuse of discretion. Kinneen v. Wells, 144 Mass. 497; Pike v. McGuire, 44 Mo. 491.

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3. Liability of Ministerial Officers.

TRACY V. SWARTWOUT.

Supreme Court of the United States. January, 1836.
10 Peters 80.

Mr. Justice McLEAN delivered the opinion of the court.

This case was brought into this court by a writ of error to the circuit court for the southern district of New York. The suit was prosecuted in that court to recover damages from the defendant,

who, as collector of the customs, had refused to allow the plaintiffs to enter and receive the payment of the lawful duties, on certain casks of the sirup of sugar-cane; which they had imported into the port of New York.

It is admitted that the law imposed no more duty on the article than fifteen per cent *ad valorem;* although the collector, acting under the instructions of the secretary of the treasury, required bond for the payment of the above duty, or, should it be required, a duty of three cents per pound. No bond was given, and the sirup remained in the possession of the collector for a long time; by which means its value was greatly deteriorated.

The question for consideration arises out of a bill of exceptions, in which the evidence is stated at large; showing the quality of the sirup, the number of gallons imported, and the refusal of the defendant to take bond for the fifteen per cent *ad valorem* duty.

It was admitted by the counsel of the plaintiffs, that the defendant acted throughout with entire good faith; and under instructions from the treasury department.

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The collector of the customs is a ministerial officer: he acts under the instructions of the secretary of the treasury, who is expressly authorized to give instructions, as to the due enforcement of the revenue laws.

Do these instructions, when not given in accordance with the law, afford a justification to the collector, or exonerate him from the payment of adequate damages for an injury resulting from his illegal acts?

The circuit court, in their charge to the jury, did not consider these instructions as a justification to the defendant; and in this they were unquestionably correct.

The secretary of the treasury is bound by the law; and although in the exercise of his discretion he may adopt necessary forms and modes of giving effect to the law; yet, neither he nor those who act under him, can dispense with, or alter any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress. The facts of the case under consideration, will forcibly illustrate this principle. The importers offer to comply with the law, by giving bond for the lawful rate of duties; but the collector demands a bond in greater amount than the full value of the cargo. The bond is not given, and the cargo is lost,

or its value greatly reduced, in the hands of the defendant. Where a ministerial officer acts in good faith, for an injury done, he is not liable to exemplary damages; but he can claim no further exemption, where his acts are clearly against law.

The collector has a right to hold possession of imported goods until the duties are paid or secured to be paid, as the law requires. But, if he shall retain possession of the goods, and refuse to deliver them after the duties shall be paid, or bond given, or tendered, for the proper rate of duties, he is liable for the damages which may be sustained by this refusal.

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The collector, in point of law, had no right to demand a bond for more than the duties at the rate of fifteen per cent *ad valorem;* and the plaintiffs were under no obligation to give bond in a greater sum.

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Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship.

The judgment of the circuit court must be reversed, and the cause remanded to that court, for further proceedings.

GRIDER V. TALLY.

Supreme Court of Alabama. December, 1884.

77 Alabama, 422.

Appeal from the Circuit Court of Jackson.

The record does not show the name of the presiding judge.

This action was brought by William M. Grider, against John B. Tally and others, the sureties on his official bond as the probate judge of said county; and was commenced on the 9th November, 1881. The complaint set out the bond, which was dated the 24th August, 1880, and conditioned that the said Tally "shall faithfully discharge the duties of such office, during the time he continues therein, or discharges any of the duties thereof;" and alleged, as a breach, that on the 21st December, 1880, plaintiff filed

his petition to said Tally, as probate judge of said county, praying for a license to sell liquor in the town of Belleforte, "having first complied with all the requirements of the law in relation to the granting of license for the sale of liquor;" that said Tally "wrongfully and unlawfully refused to issue a license to plaintiff;" that plaintiff then applied to Hon. H. C. SPEAKE, the presiding judge of the circuit, for a *mandamus* requiring said Tally to issue a license as prayed, and obtained a peremptory *mandamus*; that Tally sued out an appeal to this court from said order of Judge SPEAKE, and said order was affirmed by this court; that plaintiff thereupon again applied to said Tally to grant him a license, "according to the prayer of his petition and the judgment of said court, and said Tally again wrongfully and unlawfully refused to issue a license;" that plaintiff thereupon prayed and obtained from Judge SPEAKE an attachment, directing the sheriff of said county to take said Tally into his custody, and him safely keep until he issued a license as prayed; whereupon said Tally did issue a license to plaintiff as prayed in his said petition. Plaintiff avers, that by reason of the wrongful and unlawful refusal of said Tally to issue said license, he was put to great trouble and expense in procuring the several judgments of the courts, whereby he was greatly damaged, to-wit, in the sum of $200, and, by reason of the delay in obtaining his license, sustained great loss in his business," &c.

The court sustained a demurrer to the complaint, on the ground that, on the facts alleged, the probate judge was acting in a judicial capacity, and therefore no action would lie for an erroneous decision by him; and the plaintiff declining to amend, rendered judgment for the defendant. The judgment on the demurrer is now assigned as error.

CLOPTON, J. It is an unquestioned rule, founded on the public benefit, the necessity of maintaining the independence of the judiciary, and its untrammelled action in the administration of justice, that a judge can not be held to answer in a civil suit for doing, or omitting or refusing to do, an official act in the exercise of judicial power. His responsibility for the manner in which he discharges the high trusts committed to him is to the sovereignty from which he derives his authority. It is, also, an undisputed rule, that an officer who is charged with the performance of ministerial duties, is amenable to the law for his conduct, and is liable to any party specially injured by his acts of *misfeasance* or *nonfeasance*. When the law assigns to a judicial officer the perform-

ance of ministerial acts, he is as responsible for the manner in which he performs them, or for neglecting or refusing to perform them, as if no judicial functions were intrusted to him. The boundary of his judicial character is the line that marks and defines his exemption from civil liability.

Our law, organic and statutory, confers on the probate judge large judicial powers, and there is also assigned to him the performance of many acts merely ministerial; he is both a judicial and a ministerial officer. . . . . .

Judicial power is authority, vested in some court, officer or person, to hear and determine, when the rights of persons or property, or the propriety of doing an act, are the subject-matter of adjudication. Official action, the result of judgment or discretion, is a judicial act. The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act. *Flournoy* v. *City of Jefferson,* 17 Ind. 169; *Tenn. & Coosa R. R. Co.* v. *Moore,* 37 Ala. 371; *Morton* v. *Comp. Gen.,* 4 S. C. 430; *Commissioner* v. *Smith,* 5 Tex. 471; *Life & Fire Ins. Co.* v. *Wilson,* 8 Pet. 291. The inquiry should be directed to the question, does discretionary power attach to the office—the authority to decide, whether the license should or should not be granted?

Section 1544 of the Code provides: "No license must be granted to sell vinous or spirituous liquor, unless the applicant produce to the judge of probate of his county, or to the person authorized by law to grant such license, the recommendation of ten respectable freeholders and householders thereof, residing within four miles of such applicant, stating that they are acquainted with him, that he is possessed of good moral character, and is in all respects a proper person to be licensed." The succeeding section prescribes the oath, which the applicant must take and subscribe before license is granted; which oath may be administered by any officer authorized to administer oaths; and section 491 makes it the duty of the probate judge to issue the license upon payment of the amount required by law to be paid. Blank licenses are furnished by the auditor, to be filled and signed by the probate judge. No power is conferred on the probate judge to pass on the moral character of the applicant, or whether he is a proper person to be licensed, or on the propricty of issuing a license. He adjudges

nothing—decides no question. On the production of the proper recommendation, taking and subscribing the prescribed oath, and paying the requisite amount, it is the clear and specific duty of the probate judge to issue the license.

If it be said, that the probate judge has to ascertain that the recommendation is by the freeholders and householders of the county, residing within five miles of the applicant, a similar necessity exists in every case of a ministerial duty. A sheriff must determine whether process, coming into his hands, is issued from a court of competent jurisdiction, and is regular on its face; and a treasurer of public moneys must ascertain whether the warrant is drawn by such officer, and in such manner that its payment is a duty; but the execution of the process, and the payment of the warrant, are ministerial acts. A judge must determine whether a judgment is entered according to the verdict of the jury, or the consideration of the court, and whether a bill of exceptions correctly recites the proceedings; but the act of signing the judgment and bill of exceptions is ministerial. That a necessity may exist for the ascertainment, from personal knowledge, or by information derived from other sources, of the state of facts on which the performance of the act becomes a clear and specific duty, does not operate to convert it into an act judicial in its nature. Such is not the judgment, or discretion, which is an essential element of judicial action. *Crane* v. *Camp,* 12 Conn. 464. If the probate judge acts judicially in the matter of issuing a license, his decision is final and conclusive, and a license issued to a relative, within the degrees that disqualify a judge, is void. *Halso* v. *Seawright,* 65 Ala. 431.

An appropriate and general test is laid down in *Rains* v. *Simpson,* 50 Tex. 495, as follows: "Perhaps as safe criterion as any other, to ascertain whether a private suit will or will not lie, is to adopt the rule which governs in cases in which a *mandamus* would or would not be granted. On the refusal of the probate judge to issue the license, when first applied for, the plaintiff made application to the Circuit Court for a *mandamus,* commanding him to issue it. A peremptory *mandamus* was granted by the Circuit Court, and on appeal to this court the judgment was affirmed. *Tally* v. *Grider,* 66 Ala. 119. The character of the specific act asked to have performed was necessarily involved in the issue, and determined. This is manifest, when it is observed that a *mandamus,* issued to an officer in a matter in respect to which he has discretionary powers, requires him only to take action, without

directing the manner in which his discretion shall be exercised; but, when the act is merely ministerial, and its performance mandatory, the officer having no discretion, the *mandamus* requires and commands the doing of the specific act. If the duty of the probate judge is judicial—if he possesses discretionary power to issue or not to issue a license—a *mandamus* would not, and could not have been granted. The probate judge having already taken action and refused, a *mandamus* would have had no office to perform. Awarding a peremptory *mandamus* is a judicial ascertainment that the probate judge has no discretionary powers.

It may be proper to observe, that our consideration has been directed to the nature of the power and duty of the probate judge under the general laws providing for and regulating the issue of license to sell vinous or spirituous liquor. While we judicially know the act, commonly called the "Local Option Law," passed in 1875, and that it is applicable to Jackson county, on demurrer to the bill of complaint, which does not aver, nor make any allusion to any proceeding under the act, we can not take judicial notice that an election has been ordered and held as provided, or of its result. An expression of opinion, on the assumption that an election has been ordered, and held with a prohibitory result, would be premature, and mere *dictum*.

Reversed and remanded.

ERSKINE V. HOHNBACH.

Supreme Court of the United States. December, 1871.

14 Wall. 613.

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. . . . . Hohnbach sued Erskine, a collector of internal revenue, in an *action of trespass* for the seizure by him, the said collector, and conversion to his use of certain personal property of the alleged value of $10,000, belonging to him, the plaintiff

The declaration was in the usual form in such cases, and alleged that the seizure and conversion were made in May, 1869, at Milwaukee, in the State of Wisconsin. To this the defendant pleaded the general issue, and two special pleas, in which he justified the acts complained of on the ground that they were done by him as collector of internal revenue of the first collection district of Wis-

consin, in the enforcement of an assessment chargeable against the plaintiff, duly made by the assessor of the district, and certified to him, with an order directing its collection. Both pleas set up the same defence of justification as collector of internal revenue, differing only in the particularity with which the facts of assessment and distraint and sale of the property were detailed.

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Mr. Justice FIELD delivered the opinion of the court.

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The collector could not revise nor refuse to enforce the assessment regularly made by the assessor in the exercise of the latter's jurisdiction. The duties of the collector in the enforcement of the tax assessed were purely ministerial. The assessment duly certified to him, was his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, constituted his protection.

Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now, that if the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued. *Savacool* v. *Boughton,* 5 Wend. 171; *Earl* v. *Camp,* 16 id. 563; *Chegaray* v. *Jenkins,* 5 N. Y. 376; *Sprague* v. *Birchard,* 1 Wis. 457.

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Judgment affirmed.

COMMONWEALTH V. SHORTALL.

Supreme Court of Pennsylvania. May, 1903.

206 Pennsylvania State 165.

Petition for writ of *habeas corpus* on behalf of the relator against respondent, a constable who had him in custody under a warrant of arrest for homicide, issued by a justice of the peace in Schuylkill county.

Opinion by Mr. Justice MITCHELL, April 17, 1903:

A somewhat full statement of the facts will be conducive to the proper understanding of the case.

During the summer of 1902 a strike, beginning with a labor union known as the United Mine Workers of America, spread through nearly the whole of the anthracite coal region in Pennsylvania. As time progressed it was accompanied with increasing disorder and violence on the part of the strikers and their sympathizers, so that threats and intimidation not only of men but of their women and children, rioting, bridge burning, stoning and interference with railroad trains, destruction of property and killing of non-union workmen became of frequent occurrence. The communities affected were either in secret sympathy with these acts or lacked the courage to put an end to them.

Among the places where the disorder was greatest was Shenandoah in Schuylkill county. There the police and the sheriff in attempting to preserve the peace were overpowered and beaten by mobs of strikers, and several citizens killed. The sheriff having called upon the governor, the latter first ordered out a portion of the militia and subsequently on further call, the entire division of the National Guard, on October 6, 1902, by General Order No. 39.

The text of this order which is important is as follows: "In certain portions of the counties of Luzerne, Schuylkill, Carbon, Lackawanna, Susquehanna, Northumberland and Columbia, tumult and riot frequently occur and mob law reigns. Men who desire to work have been beaten and driven away and their families threatened. Railroad trains have been delayed and stoned, and tracks torn up. The civil authorities are unable to maintain order and have called upon the governor and commander-in-chief of the National Guard for troops. The situation grows more serious each day. The territory involved is so extensive that the troops now on duty are insufficient to prevent all disorder. The presence of

the entire division, National Guard of Pennsylvania, is necessary in these counties to maintain the public peace. The major general commanding will place the entire division on duty, distributing them in such localities as will render them most effective for preserving the public peace. As tumults, riots, mobs and disorder usually occur when men attempt to work in and about the coal mines, he will see that all men who desire to work, and their families, have ample protection. He will protect all trains and other property from unlawful interference, will arrest all persons engaging in acts of violence and intimidation, and hold them under guard until their release will not endanger the public peace, and will see that threats, intimidations, assaults and all acts of violence cease at once. The public peace and good order will be preserved upon all occasions and throughout the several counties, and no interference whatsoever will be permitted with officers and men in the discharge of their duties under this order. The dignity and authority of the State must be maintained, and her power to suppress all lawlessness within her borders be asserted."

Under this order the 18th Regiment, being part of the troops under command of Brigadier General Gobin, was stationed in and near Shenandoah. Several houses occupied by non-union men had been dynamited and attempts made upon others. On October 8, therefore, General Gobin issued the following order: "At 5:30 P. M. a detail of one corporal and six men should be put at the house of Barney Bucklavage, No. 1118 West Coal street; this house was dynamited on the night of October 6th and is occupied by a woman and four small children, and for the present I deem it best to guard it; my instructions to the guards have been that they shall keep a sentry at the front door sitting inside the house with the door ajar, and one sentry sitting just outside the rear door under the porch, and if any attempt is made to dynamite them, or they are shot at, or stoned, or any suspicious characters prowl around, particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot, and shoot to kill."

The relator, Arthur Wadsworth, was a private in Company A of the 18th Regiment, in service there, and in the evening of October 8 was posted as sentry in the front yard of the Bucklavage house, just outside the door, with orders to halt all persons prowling around or approaching the house, and if the persons so challenged failed to respond to the challenge after due warning "to shoot, and shoot to kill." About 11:30 o'clock he discovered a man approaching along the side of the road nearest the house and called

"Halt." The man continued to advance toward the gate. Wadsworth called again "Halt." The man continued to advance. Wadsworth then touched the door and said "Corporal of the guard." He then called "Halt" and again "Halt." The man by this time had opened the gate and was coming into the yard, when Wadsworth, in accordance with his orders, fired and the man, whose name was afterwards found to be Durham, fell to the ground dead.

A coroner's inquest was held and the jury found that "the shooting was hasty and unjustifiable" and recommended that the matter be placed in the hands of the district attorney for investigation. In the meantime, on complaint before a justice of the peace, a warrant had been issued for the arrest of Wadsworth, and after the return of the regiment from service he was arrested at his home in Pittsburg by the respondent, a constable of the borough of Shenandoah. A writ of *habeas corpus* was allowed by the presiding justice of this court, and the commonwealth not making any charge higher than manslaughter, the relator was admitted to bail, pending the argument of the case.

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The issue of General Order No. 39 by the governor was a declaration of qualified martial law, in the affected districts. In so characterizing it we are not unmindful of the eminent authorities who have declared that martial law cannot exist in England or the United States at all, or at least, according to the more moderate advocates of that view, not in time of peace. . . . . .

Order No. 39 was, as said, a declaration of qualified martial law. Qualified in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose it was martial law with all its powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

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When the mayor or burgess of a municipality finds himself unable to preserve the public order and security and calls upon the sheriff with the posse comitatus, the latter becomes the responsible

officer and therefore the higher authority. So if in turn the sheriff finds his power inadequate, he calls upon the larger power of the State to aid with the military. The sheriff may retain the command, for he is the highest executive officer of the county, and if he does so, ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the State, the governor intervenes as the supreme executive and he or his military representative becomes the superior and commanding officer. So too if the sheriff relinquishes the command to the military, the latter has all the sheriff's authority added to his own powers as to military methods.

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The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.

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There is no real difference in the commander's powers in a public war and in domestic insurrection. In both he has whatever powers may be needed for the accomplishment of the end but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts, and by civil action at the instance of the parties aggrieved. On this all the authorities agree, and the result flows from the view that martial law in this sense is merely an extension of the police power of the State, and therefore, as expressed by Judge HARE . . . . . an "offshoot of the common law which though ordinarily dormant in peace, may be called forth by insurrection or invasion." See *Respublica* v. *Sparhawk*, 1 Dallas 357; *Mitchell* v. *Harmony*, 13 How. (U. S.) 115; *Ford* v. *Surget*, 97 U. S. 594, and English cases cited in 2 Hare on Const. Law, ch. xli.

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Coming now to the position of the relator, in regard to responsibility, we find the law well settled. . . . . .

The cases in this country have usually arisen in the army and been determined in the United States courts. But by the Articles of War (art. 59) under the acts of Congress, officers or soldiers charged with offenses punishable by the laws of the land, are required (except in time of war) to be delivered over to the civil (i. e. in distinction from military) authorities; and the courts proceed upon the principles of the common (and statute) law: 31 Fed. Repr. 711. The decisions therefore are precedents applicable here.

A leading case is *United States* v. *Clark*, 31 Fed. Repr. 710. A soldier on the military reservation at Fort Wayne had been convicted by court martial and when brought out of the guardhouse with other prisoners at "retreat," broke from the ranks and was in the act of escaping when Clark, who was the sergeant of the guard, fired and killed him. Clark was charged with homicide and brought before the United States district judge, sitting as a committing magistrate. Judge BROWN, now of the Supreme Court of the United States, delivered an elaborate and well considered opinion, which has ever since been quoted as authoritative. In it he said, "The case reduces itself to the naked legal proposition whether the prisoner is excused in law in killing the deceased." Then after referring to the common-law principle that an officer having custody of a prisoner charged with felony may take his life if it becomes absolutely necessary to do so to prevent his escape, and pointing out the peculiarities of the military code which practically abolish the distinction between felonies and misdemeanors, he continued, "I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice."

In *McCall* v. *McDowell*, 1 Abb. (U. S.) 212, where an action was brought by plaintiff against Gen. McDowell and Capt. Douglas for false imprisonment under a general order of the former for the arrest of persons publicly exulting over the assassination of President Lincoln, the court said, "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander, otherwise he is

placed in a dangerous dilemma of being liable to damages to third persons, or obedience to the order or for the loss of his commission and disgrace for disobedience thereto. . . . . Between an order plainly legal and one palpably otherwise there is a wide middle ground where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require that the order of the superior should protect the inferior, leaving the responsibility to rest where it properly belongs, upon the officer who gave the command." The court sitting without a jury accordingly gave judgment for Capt. Douglas, though finding damages against Gen. McDowell.

In *United States* v. *Carr,* 1 Woods 480, which was a case of the shooting of a soldier in Fort Pulaski by the prisoner who was sergeant of the guard, WOODS, J., afterward of the Supreme Court of the United States, charged the jury: "Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased, with his surroundings at the time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened to ripen into mutiny. If he had reasonable ground so to believe, then the killing was not unlawful. But, if, on the other hand, the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

In *Riggs* v. *State,* 4 Cald. 85, the Supreme Court of Tennessee held to be correct an instruction to the jury that "any order given by an officer to his private which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him."

These are the principal American cases and they are in entire accord with the long line of established authorities in England.

Applying these principles to the act of the relator, it is clear that he was not guilty of any crime. The situation as already shown was one of martial law, in which the commanding general was authorized to use as forcible means for the repression of violence as his judgment dictated to be necessary. The house had been dynamited at night and threatened again. With an agent so destructive, in hands so lawless, the duty of precaution was correspondingly great. There was no ground therefore for doubt as to the legality of the order to shoot. The relator was a private soldier and his first duty was obedience. His orders were clear and specific, and the evidence does not show that he went beyond them in his action. There was no malice, for it appears affirmatively that he did not know the deceased, and acted only on his orders when the situation appeared to call for action under them. The unfortunate man who was killed was not shown to have been one of the mob gathered in the vicinity, though why he should have turned into the gate is not known. The occurrence, deplorable as it was, was an illustration of the dangers of the lawless condition of the community, or of the minority who were allowed to control it, and must be classed with the numerous instances in riots and mobs, where mere spectators and even distant non-combatants get hurt without apparent fault of their own.

Whenever a homicide occurs it is not only proper but obligatory that official inquiry should be made by the legal authorities. Such an inquiry was had here at the coroner's inquest, and if there were any doubt about the facts we should remand the relator to the custody of the constable under his warrant, for a further hearing before the justice of the peace. But there was no conflict in the evidence before the coroner, and the commonwealth's officer makes no claim here that anything further can be shown. The facts therefore are not in dispute, and the question of relator's liability depends on whether he had reasonable cause to believe in the necessity of action under his orders. As said by Judge HARE, citing Lord MANSFIELD in *Mostyn* v. *Fabrigas*, 1 Cowper 161, "The question of probable cause in this as in most other instances, is one of law for the court. The facts are for the jury; but it is for the judge to say whether, if found, they amount to probable cause." Hare's Const. Law 919.

In *United States* v. *Clark*, 31 Fed. Repr. 710, already cited, Mr. Justice BROWN said, "it may be said that it is a question for the

jury in each case whether the prisoner was justified by the circumstances in making use of his musket, and if this were a jury trial I should submit that question to them . . . . . but as I would, acting in (that) capacity, set aside a conviction if a verdict of guilty were rendered, I shall assume the responsibility of directing his discharge."

This court, either sitting as a committing magistrate or by virtue of its supervisory jurisdiction over the proceedings of all subordinate tribunals (*Gosline* v. *Place,* 32 Pa. 520) has the authority and the duty on *habeas corpus* in favor of a prisoner held on a criminal charge, to see that at least a *prima facie* case of guilt is supported by the evidence against him. In the relator's case the facts presented by the evidence are undisputed and on them the law is clear and settled. If the case was before a jury we should be bound to direct a verdict of not guilty and to set aside a contrary verdict if rendered. It is therefore our duty now to say that there is no legal ground for subjecting him to trial and he is accordingly discharged.

The relator, Arthur Wadsworth, is discharged from further custody under the warrant held by respondent.

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4. *Liability for Acts of Subordinates.*

ROBERTSON V. SICHEL.

Supreme Court of the United States. October, 1887.

127 U. S. 507.

This was an action at law, brought in the city court of the city of New York, by Emilie Sichel, an infant, by Joseph Sichel, her guardian *ad litem,* against William H. Robertson, collector of customs for the port and collection district of New York, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York.

The object of the suit was to recover damages for the loss of the contents of a trunk belonging to the plaintiff, who was a passenger by the steamship Egypt of the Inman line, from Liverpool and arrived at New York, at the pier of the ship, on the 31st of January, 1883. . . . . Her baggage was examined on the dock and one trunk was detained by the customs officers, who gave her

a receipt therefor, signed by an inspector, which stated that the inspector had sent the one trunk, for appraisement, to the public store, under a baggage permit. She was directed by the officers to call, the next day, at the public store to receive the trunk. . . . The plaintiff demanded the trunk at the public store, but did not receive it because it had been destroyed by fire. on the pier of the ship, on the night of January 31st, 1883.

. . . . . .

At the close of the plaintiff's case, the defendant asked the court to direct a verdict for him on the ground that the action being one for personal negligence, the plaintiff had not brought home to the collector personally any connection with the trunk at the time it was destroyed, and that, if any negligence was to be imputed to the subordinate officers of the customs, such negligence could not be imputed to the collector. The court refused to grant the motion, and the defendant excepted.

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The court charged the jury, that if one of the subordinate officers of the customs, in the course of the performance of his duty, did an absolute wrong to the plaintiff, such as to take her trunk from her and keep it from her when she wanted it, and was by law entitled to it, the defendant would be liable. The defendant excepted to this charge.

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The jury found a verdict for the plaintiff for $459. The court ordered that a certificate of probable cause be entered, and on the verdict, without costs added, a judgment was entered for the plaintiff for $502.96, to review which the defendant brought a writ of error.

Mr. Justice BLATCHFORD, after stating the case, as above reported, delivered the opinion of the court.

We are of opinion that there was error in the charge of the court, and that the defendant was not liable for the wrong, if any, committed by its subordinates, on the facts of this case. There is nothing in the evidence to connect the defendant personally with any such wrong. No evidence was given that the officers in question were not competent, or were not properly selected for their respective positions. The subordinate who was guilty of the wrong, if any, would undoubtedly be liable personally for the tort, but to permit a recovery against the collector, on the facts of this case, would be to establish a principle which would paralyze the public service. Competent persons could not be found to fill positions of the kind, if they knew that they would be held liable

for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person.

This principle is well established by authority. It is not affected by the fact that a statutory action is given to an importer, to recover back, in certain cases, an excess of duties paid under protest; nor by the fact that a superior officer may be held liable for unlawful fees exacted by his subordinate, where lawful fees are prescribed by statute, and where such fees are given by law to the superior, or for the act of a deputy performed in the ordinary line of his official duty as prescribed by law. The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; . . . . .

The head of a department or other superior functionary, is not in a different position. A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the non-feasances, or negligences, or omissions of duty, of the sub-agents or servants or other persons properly employed by or under him, in the discharge of his official duties. Story on Agency, S. 319.

In *Keenan* v. *Southworth,* 110 Mass. 474, it was held, that a postmaster was not liable for the loss of a letter, occasioned by the negligence or wrongful conduct of his clerk. The court said: "The law is well settled, in England and America, that the postmaster general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him and subject to his orders."

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The very question here involved came before the Circuit Court of the United States for the Southern District of New York, in the case of *Brissac* v. *Lawrence,* 2 Blatchford 121, in June, 1850. The defendant was the collector of the port of New York. Imported goods belonging to the plaintiff had been deposited in a custom-house warehouse, and were either lost or mislaid there, or were delivered to some person not entitled to them. At the trial it was sought to show carelessness on the part of the defendant, as the head of the custom-house department, in the manner in which the books of the warehouse were kept, and also that the book-keeper was a person of intemperate habits and unfit for the situation. On the other hand, it was proved that the books were

kept in conformity with the mode usually adopted at the time for keeping books of that kind; that the intemperate book-keeper had been discharged; and that, during a period of nineteen months, out of two hundred thousand packages of goods that had been received at the warehouse in question, only two packages had been lost. Mr. Justice NELSON, in charging the jury, submitted to them the question whether the collector had been guilty of personal negligence in respect to the goods. In the course of the charge, the court said: "The collector is not personally responsible for the negligence of his subordinates in the custom-house department, and, therefore, he is not responsible for the negligence of persons employed in the warehouse department. . . . . In order to charge the defendant with the loss, it is necessary that the plaintiffs should satisfy you, by affirmative and responsible testimony, that the collector was personally guilty of negligence in the discharge of his duty, either by misdeed or by omission. . . . . This is a suit against the collector, who did not have charge of the goods, and, in order to render him liable, you must find him to have been guilty of personal neglect, misfeasance or wrong. . . . . In view of the fact that the collector of New York has charge of all the business from which two-thirds of all the revenue of the United States is collected, and has thousands of subordinates, and upon the evidence that only one package out of every one hundred thousand which passed through the hands of those subordinates has been lost, it is strange that this case has been so urgently pressed, with the idea that, upon any principle of equity, much less of law, there could be any liability on the part of the collector." The jury found a verdict for the defendant. See also, *United States* v. *Brodhead,* 3 Law Reporter 95; Wharton on Agency, § 550.

The judgment of the Circuit Court is reversed, and the case is remanded to that court with a direction to grant a new trial.

ROBINSON V. ROHR.

Supreme Court of Wisconsin. February, 1889.

73 Wis. 436.

Appeal from the Circuit Court for Jefferson County.

Action to recover damages for personal injuries alleged to have been caused by the negligence of the defendants and their em-

ployees. The seven defendants who answered the complaint constituted the board of street commissioners of the city of Watertown. The city was made a defendant, but did not answer or appear in the action. The facts are sufficiently stated in the opinion. The plaintiff appeals from a judgment in favor of all the defendants except the city.

ORTON, J. The above defendant, William Rohr, and six others are charged in the complaint as follows: They were constructing and repairing stone piers and abutments under the Main-Street bridge over the Rock River, in the city of Watertown, and there was standing in an upright position on said bridge a large and heavy hoisting machine, known as a derrick, which was placed there by them, and before that day had been used by them in repairing and constructing said piers and abutments. The plaintiff was walking along upon that portion of the bridge which was set apart for persons traveling on foot, and through the carelessness and negligence of the defendants, their agents, servants and employees, said derrick was allowed to fall across and upon said bridge, and upon the plaintiff, while she was walking along as a traveler on said highway bridge, and without fault on her part; whereby she was greatly hurt, bruised and injured.

The defendants by answer admit that the piers and abutments of said bridge were being constructed and repaired, but deny that *they* were constructing or repairing the same, and deny that it was through their fault or that of their agents, servants, or employees, that the derrick fell upon the plaintiff, and that she was greatly injured thereby, or that she received any injuries by reason of their negligence or that of their agents, servants, or employees, and deny that the plaintiff was without fault, and avow that her own negligence contributed to her injury. They allege that said bridge had been out of repair for some time, and needed repair and reconstruction; and that as the board of street commissioners of said city, in its collective and legislative capacity, *they had duly let the work of repairing and constructing said piers and abutments to competent persons to do that work,* and the said persons were then engaged in the due prosecution of said work, exercising due and proper caution in operating the said derrick.

The facts in respect to said mason-work on the piers and abutments, stated in respondents' brief and proved on the trial, were as follows: The clerk of the city was directed by the defendants, in accordance with the requirement of sec. 3 of subch. 9 of the

city charter[1] in respect to all such work, to advertise for proposals for doing the mason-work and furnishing materials for the bridge according to the plans and specifications adopted by them as the board of street commissioners, to be received up to a certain date; and on that day the proposal of one Charles Baxter for doing said work and furnishing materials was accepted by them, and they directed a contract to be entered into with him according to said proposal, and that the said work be let to him, he being the lowest bidder for the same. But before any contract was entered into with him, and before, as they ascertained, he had acquired any rights in the same, by resolution of the defendants as such board the whole matter was left open and undisposed of for their future action. Their committee to whom the matter had been referred, reported plans and specifications of said mason-work and materials, and recommended that said work and furnishing materials be done by themselves, under the supervision of their committee on streets and bridges, and that a superintendent be appointed, and said resolution was accordingly adopted by them. In this manner the work upon said bridge commenced and was carried on by the defendants through their superintendent and other persons employed by them, and under the supervision of their committee, up to the time the plaintiff was injured by the falling of the derrick by the negligence of their servants. No contract was ever let to any one to do said work or to furnish materials for the same, but the defendants did the work, instead of a contractor obtained according to the requirement of the charter as the lowest bidder for the same. On these facts the Circuit Court directed a verdict for the defendants, except the city of Watertown.

It will be seen that the facts proved do not support the answer as to letting the work to other persons. It may be said here that all the authorities cited by the learned counsel of the respondents have application only to the case made by the answer, and in no respect to that made by the facts proved. The same elementary authorities cited by them make the very distinction which here exists between the answer and the proofs. The board of street commissioners, when they determined upon the work and adopted the plans and specifications of it, acted as public officers, exercising judicial and legislative power, and they are not amenable to any-

[1] Ch. 233, Laws of 1865, sec. 3, subch. 9, is as follows: "All work for the city of either ward thereof shall be let by contract to the lowest responsible bidder, and due notice shall be given of the time and place of letting such contract."—Rep.

one except the public for any errors, negligence or mere misfeasance in the matters within their jurisdiction. In this case they are not charged with any dereliction in these respects. But when, after adopting the plans and specifications, they undertake to carry them out practically and do the work themselves, and employ agents and servants to execute the plans and specifications manually, then, if they are acting as officers at all, they are merely *ministerial* officers, and not judicial or legislative, and, according to the same authorities, are liable to third persons for their negligence or misfeasance, or, as the authorities say, as public officers, they acted *in a ministerial capacity*, and are therefore liable. Cooley on Torts, 339-376. If, as public officers, they owe only a duty to the public and are not liable to persons, yet, if they so act as to owe a duty to individuals, then their negligence therein is an individual wrong which may be redressed by private action. In this case the defendants owed a duty to the traveling public, and to the plaintiff while traveling over the bridge, to look out for her personal safety, while they were managing the work through their servants. This is not a public, but a private, duty, they must discharge properly or be liable to those injured by their negligence. As public officers, acting for the public alone, they are exempt from personal liability. The doctrine of *respondeat superior* does not apply to such. But if, as the authors say, they engage in some special employment, and their duties are of a more private character, and concern individuals as well as the public, they are amenable to private actions. Whart. Neg. § 284; Shearm. & Redf. §§ 166, 167. This distinction is plainly marked and easily applied. The authorities cited by the learned counsel of the respondents apply only to the first class, and therefore are not applicable to this case;

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This is sufficient as to the principle which governs this case, treating the defendants as officers as well as operatives.

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Whenever a person sued sets up a defence that he was an officer of the government acting under color of law, it plainly devolves upon him to show that the law which he invokes authorizes the *particular act* in question to be done, and that he acted in good faith. *Tweed's Case*, 16 Wall. 504. But where the issue is negligence, motives or good faith are immaterial. *Hoover* v. *Barkhoof*, 44 N. Y. 113. Where an officer injures another while performing *ministerial* duties, he is liable. *Mills* v. *Brooklyn*, 32 N. Y. 489.

For a personal injury caused by the negligence of several persons they are severally or jointly liable. *Creed* v. *Hartmann*, 29 N. Y. 591; *Peoria* v. *Simpson*, 110 Ill. 294; *Wright* v. *Compton*, 53 Ind. 337; *State ex rel. Reynold* v. *Babcock*, 42 Wis. 138. These general propositions are indisputable, and, with the authorities, are taken from the brief of the learned counsel of the appellant. We conclude, therefore, that the plaintiff had a right to recover against the defendants . . . . . and that the court erred in directing a verdict in their favor.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

A motion for a rehearing was denied February 19, 1889.

Other instances of actions in tort against officers in this collection are Kinneen v. Wells, 144 Mass. 497, denial of elective franchise; Page v. Staples, 13 R. I. 306, false imprisonment; Bell v. Pierce, 51 N. Y. 12; Mygatt v. Washburn, 15 N. Y. 316, unlawful tax assessment; Bergen v. Clarkson, 6 N. J. L. 468, unlawful distraint of property; Lawton v. Steele, 119 N. Y. 226; Fields v. Stokely, 99 Pa. St. 306; Raymond v. Fish, 51 Conn. 80, alleged unlawful abatement of nuisances, all *supra*. See also Luther v. Borden, 7 Hun. (U. S.) 1; Little v. Barreme, 2 Cranch. (U. S.) 170; Kilbourn v. Thompson, 103 U. S. 168.

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5. *Liability to Third Persons on Official Bond.*

THE PEOPLE EX REL. KELLOGG V. SCHUYLER.

Court of Appeals of New York. December, 1850.

4 New York 173.

GARDINER, J. The only question presented by the pleadings is whether the sheriff and his sureties are liable upon his official bond, for a trespass committed by the former in taking the goods of the relator, in an attempt to execute regular and valid process, issued against the property of another.

The bond was in form to the people of the state; it was in effect a security, not only to suitors, who might have a direct interest in the action of the sheriff, but to every citizen who might be injured by his official misconduct. Before and at the time of the alleged trespass, Schuyler was sheriff of the county of Rensselaer. As a public officer, the attachment in question was necessarily and

lawfully delivered to and received by him. He assumes to levy and draw up his inventory as sheriff; as sheriff he rightfully summoned a jury, to determine the title to the property seized, and subsequently, in his official character, received an indemnity and detained the goods, in opposition to the verdict. He received the attachment, therefore, not colore officii, but in virtue of his office. His sureties undertook "that he should faithfully execute" the process. If he had "in all things" performed his duty, he would have seized the goods of Fay or returned the writ, instead of which he levied on the goods of Batcheller, as the property of the defendant in the attachment. Upon principle, and upon grounds of public policy, it seems to me, that the responsibility of his sureties should be different from those they would incur, if the sheriff had entered upon the premises of the relator, and removed his goods without any process whatever. In the last case supposed, the sheriff would act in his own right, and might be resisted as any other wrongdoer. In the one before us, he was put in motion by legal authority, invoked in behalf of others, and could command the power of the county to aid him in its execution. Respect for the process of our courts, and for the official character of the sheriff, if it did not forbid forcible opposition (which must have been unavailing), is incompatible with the notion of making resistance indispensable as a means of protection. This must be the alternative, if those who are thus aggrieved are driven to rely exclusively upon the responsibility of the officer, who, as in this case, may be wholly insolvent.

It was, however, assumed by Judge COWEN, in *Ex parte Reed*, (4 Hill, 573,) that no such distinction was recognized by our law, and that in neither case would the sheriff or his sureties be liable upon his official bond. He remarks, "that the words of the obligation cannot be extended beyond nonfeasance or misfeasance, *in respect to acts* which by law he is required to perform as sheriff." This may be admitted: but in the case then before the court, and in the present, the sheriff as the executive officer of his county, received a regular process issued by a court of competent jurisdiction, by which he was commanded to act as sheriff. If he had neglected to act without some legal excuse, it would have been a nonfeasance; if he had acted wrongfully in attempting to obey the mandate, it would have been a misfeasance "in respect to acts which he was required to perform as sheriff." The distinction is between a case in which a duty is imposed at law upon an officer as such, which he is bound by his peril faithfully to discharge, and

in which there is no such obligation. Where the duty exists, and it is neglected, or performed in an improper manner, the sureties upon principle should be liable, otherwise not.

The learned judge, in the case referred to says: "That the words of the obligation are operative for the purpose of obliging the sheriff to act *properly,* in all those things which come within the scope of his power or duty." The answer to this suggestion is, that it is within the power of every officer receiving process, to execute it or to abstain from its execution, for reasons which he can assign, and which the law will recognize; and with this power it is within "the scope of his duty to act properly, if he elects to act under it at all." It is true, as Judge Cowen remarks, "that a trespass is not the faithful performance of the office, or any performance at all." It is, however, equally true, that the faithful performance of the office was the duty imposed by law upon the sheriff, and guaranteed by his sureties. They now insist, in bar of the action, not that the sheriff fulfilled this obligation, but that in violating it he committed a trespass. Again, the learned judge remarks, "there being no authority, there is no office, nothing official." If by this we are to understand, that there being no authority for the act complained of as a breach of official duty, there was no office, and nothing official, the argument, if sound, would preclude a recovery in any case against the sureties. If an authority could be shown, their defence would be complete; if there was none, the act would be extra official, and not within the scope of their undertaking.

In *Ex parte Chester,* (5 Hill, 555,) the court directed the prosecution of the official bond of the sheriff and his sureties, in consequence of a false return by the former. This was a misfeasance, for which the sheriff was liable in an action of tort. It might have been argued upon the authority of *Ex parte Reed,* "that the commission of a tort was not the faithful performance of his office as sheriff, or any performance at all." The objection was as applicable in one case as the other. It is no answer to say that in *Ex parte Chester,* a return of the execution was authorized and required by law, and the misconduct consisted in doing the required act in an improper manner. The fi. fa. in *Ex parte Reed,* and the attachment in this case, authorized and required the sheriff to levy upon property; in both cases the seizure of the property of third persons was doing the required service in an improper manner. In each of the above cases, the specific acts, which gave the right of action against the officer, were unauthorized. Other-

wise there could have been no misfeasance. In each, however, the sheriff was directed by legal process to perform an official act of the same character, of that which was the subject of complaint. In each he assumed to discharge a duty pertaining to his office, by means which the law did not authorize or permit.

That irregularities of the kind mentioned do not wholly deprive the proceeding of an official character, is manifest from the construction which, in this country and abroad, has been given to statutes framed for the protection of public officers, in reference to pleading, notice and venue. The English statutes and our own refer to acts done "virtute officii," and yet they have uniformly been held to extend to acts of misfeasance, whether the remedy against the officer was in case or trespass. (*Straight* v. *Gee*, 2 *Stark Rep.* 448; *Reed* v. *Thompson; Weller* v. *Toke*, 9 *East.* 364; *Morgan* v. *Palmer*, 2 *Barn. & Cres.* 729; *Seely* v. *Birdsall*, 15 *John.* 268; 1 *Mass. Rep.* 530.)

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But we are not without direct authority on this question. In *Skinner* v. *Phillips*, (4 *Mass. Rep.* 69), the suit was scire facias against a sheriff and his sureties reciting the official bond of the former, the condition of which was, "that he should faithfully execute the duties of his office." The declaration set forth a judgment against the sheriff in favor of the plaintiff for damages by and through *misfeasance* and *malfeasance* of the sheriff. On demurrer to the declaration, it was determined by the court, C. J. PARSONS delivering the opinion, "that any party injured by the malfeasance of the sheriff or his deputy, was entitled to relief upon the bond."

In *Archer* v. *Noble*, (3 *Greenl.* 418), a constable had given a bond with sureties "for the faithful performance of his duties and trust, as to all processes by him served or executed." It was held, that if he seized the good of A. under an execution against B. it was not merely a private trespass, but a breach of his bond. In *Harris* v. *Hanson*, (11 *Maine*, 241), it was decided, that the taking of the property of one, by a coroner, upon a suit against another, was a malfeasance in office, constituting a breach of this bond given "for the faithful performance of the duties of his office." In *Cormack* v. *Commonwealth*, (5 *Binney*, 184), the sureties of the sheriff were held liable on a similar bond, where the goods of A. were taken upon a fi. fa. against B. In *Forsyth* v. *Ellis*, (4 *J. J. Marsh*, 229), the precise question was determined the same way in Kentucky; and in *Commonwealth* v. *Stockton*, (5 *Monroe*, 192).

In this State the decision in *Ex parte Chester* cannot upon principle be reconciled with the previous one in *Ex parte Reed.* The question must have been deemed an open one, or permission would not have been granted to the plaintiff to prosecute this suit, by the same court who refused it in *Ex parte Reed.* The point was presented in each case upon motion, and the decisions are directly opposed to each other. We are not, therefore, concluded by the action of our own courts. The adjudications of the highest courts in at least three of the neighboring states, sustain the action. The defendants have referred to no case beyond this state, to the contrary. The weight of authority, and as it seems to me, a fair construction of the obligation of the defendants, are both in favor of the plaintiff.

There is another consideration which is deserving of attention. The action of trespass against sheriff for the seizure of property in the execution of legal process, is sui generis. It is regarded by the law in many instances, as a means of determining the title to property, rather than in the light of an ordinary trespass. Good faith upon the part of the officer is presumed, and he may consequently require and receive indemnity before proceeding to the final execution of the writ. (8 *John R.* 185; 8 *Cowen,* 67.) The form of the indemnity in this case was prescribed by statute, and the sheriff made the sole judge of its sufficiency. (2 *R. S.* 4, §§ 10, 11.) His sureties on payment of the judgment against their principal, would be entitled to subrogation, and to the benefit of his security; while no provision is made for its assignment to those who have been deprived of their property. The omission, I grant, will not enlarge the undertaking of the sureties. But it shows, what is indeed manifest from the whole structure of the statute, that its framers supposed that in all his proceedings under it, the sheriff was in an important sense acting officially; that the idea did not occur to them, that in making an erroneous seizure under the attachment, the sheriff divested himself of all the insignia of his office, to be resumed when he took a bond and detained the property. This is the view of the defendants. We are inclined to regard the original taking as a misapplication by the sheriff of the authority of his office, for which his sureties are responsible.

The judgment of the supreme court must be reversed.

BRONSON, Ch. J., and JEWETT, HARRIS and TAYLOR, Justices, concurred.

PRATT, J. (dissenting). In the examination of this case it be-

comes necessary, in the first place, to ascertain the precise nature of the covenant into which the sureties of the sheriff have entered, in order that we may be the better prepared to examine the question whether their covenant has been broken. The condition as presented in the statute, which is precisely the same as that set out in the pleadings, is in these words: that the sheriff "shall well and faithfully in all things, perform and execute the office of sheriff of said county, during his continuance in said office, by virtue of the said election, without fraud, deceit or oppression." (1 *R. S.* 378.) The statute also provides that "whenever a sheriff shall have become liable for the escape of any prisoner, committed to his custody, or whenever he shall have been guilty of any default or misconduct in his office, the party injured may apply to the supreme court for leave to prosecute the official bond of such sheriff." (2 *R. S.* 476.)

It is clear to me that the sureties under this bond guarantee the public against official delinquency on the part of the sheriff, and that the guaranty extends to that alone. That in no case except for an escape can they be made liable, unless it be proved that the sheriff has violated some duty resting upon him as a public officer; and in all cases except when the action has been brought for an escape, it is a perfect defence on their part if it appear that the sheriff exercised due diligence; that he was guilty of no want of fidelity to his trust. The case of an escape is an exception. It is made so by the statute, and therefore no degree of diligence will excuse them. . . . .

It is an elementary principle, that the undertaking on the part of the sureties, is not to be extended by construction, one iota beyond its terms, but on the contrary it is to be strictly construed in their favor. (18 *John.* 389; 10 *id.* 180.) The question, therefore, in this case is not whether the sheriff has not done some act *colore officii* for which he may be liable to an action, but the question for our consideration is whether the declaration shows any misconduct in his office; any want of fidelity to the trust reposed in him as sheriff; or any failure in his official duty as such, by which the plaintiff has suffered damage.

Now what duty has he violated? or what negligence or misconduct has he been guilty of? An attachment had been delivered to him, under which he proceeded to levy on some property, supposed by him to belong to the defendant in the execution. The relator interposed a claim of title; the sheriff summoned a jury to try the validity of such claim, and they found the property in the re-

lator. A sufficient indemnity was then tendered to him by the plaintiff in the attachment, and the sheriff thereupon detained the property. In all this the sheriff followed the express directions of the statute. Had he deviated from these directions, he would clearly have departed from his duty, and made himself and his sureties liable to an action. (2 *R. S.* 4, §§ 10, 11; 8 *John.* 185; 1 *Hall,* 595; 8 *Cowen,* 67.) How, then, it may well be asked, can a breach of duty be predicated upon an act by the sheriff, which the statute requires him to perform, and which, if he should neglect to perform, would itself constitute a breach of duty? Are the sheriff and his sureties placed by the law in any such embarrassing dilemma? Does the law tolerate any such legal absurdity, as that an act is at the same time both a performance and a violation of official duty; a performance and a breach of the conditions of a bond? And yet, if this declaration can be sustained upon this point, it must be upon this hypothesis, however absurd it may be.

The question may be asked, how then was the sheriff made liable at all? How could an action of trespass be sustained against him for taking property which a due discharge of his official duty required him to take? The answer is, he was made liable not upon the assumption that he has violated his duty as sheriff, but by utterly repudiating his official character, and bringing an action against him as a naked trespasser. Had an action been brought against the sheriff for official misconduct, or neglect of official duty, he could have defended successfully by showing the facts set out in this declaration. But the claimant made no complaint of that character, but reposing upon the strength of his title, makes that the issue, and thus the official character of the sheriff in the commission of the act becomes entirely immaterial. Hence the question which was discussed at some length upon the argument, whether the sheriff, in taking the property, acted officially or not becomes immaterial. The question is not in what character the sheriff intended to act, but in what character is he made liable. If he is not made liable for some misconduct in his office, for some want of fidelity to his trust, it is not within the undertaking of his sureties. Thus I cannot perceive any difference between a case of this kind, and one where the officer should take property without any process. So far as his liability is concerned, the process neither aids or injures him. The question tried does not depend upon his good or ill conduct, whether the circumstances raised a strong presumption that the property belonged to the defendant in the execution or not.

. . . . Now, as I have already said, the question is: in what character is the sheriff made liable, and not in what character did he design to act in taking the property? The authorities recognize a principle or rule by which the acts of the sheriff, for which his sureties may be held liable, can be distinguished from those acts for which they will not be held liable. The former are termed acts done *virtute officii*, and the latter *colore officii*. The distinction is this: Acts done *virtute officii* are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii*, are where they are all of such a nature, that his office gives him no authority to do them. (*Seely* v. *Birdsall*, 15 *John.* 267; *Alcock* v. *Andrews*, 22 *Esp.* 540, n.) This distinction is as old as the common law, and has been acted upon and recognized in numerous cases, some of which I shall hereafter advert to. It is true, that in some cases statutes made for the protection of public officers, have been extended by construction to cases avowedly not within the terms of such statutes; but they can scarcely afford any authority for departing from the strict construction of the undertaking of sureties, for the purpose of extending their liability. It is not necessary in this case, to insist, that the distinction adverted to is universally applicable to the liability of sureties, upon undertakings similar to the one in this case; yet, as there must be some limit to their liability, some line of demarcation, designating those acts of the sheriff to which their liability extends, and beyond which it does not extend, it will be found that this distinction is based upon correct legal principles, and is supported by an abundance of authority. In the one case, the inquiry relates entirely to the official conduct of the officer, whether he has neglected any duty which the law imposed upon him, or whether in doing an act which the law requires him to do, he has acted faithfully and honestly; whilst in the other case, his care, or diligence, or faithfulness, is not a subject of inquiry at all; the enquiry being limited exclusively to his power or authority to do the act.

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I have thus far examined the question involved in this case upon principle. Upon authority the positions which I have assumed are supported by a decided preponderance, especially in this state. Indeed, in this state I have not been able to find even a dictum to the contrary. The cases of *Ex parte Reed* (4 *Hill*, 572), and *Ex parte Martin*, referred to in that case, are directly in point. The

precise question was passed upon in both cases; and although they were decided upon motion at special term, yet the former at least was decided by Judge Cowen, after consultation with the other judges of the court. The case of *The People* v. *Spraker and others* (18 *John.* 390), is also in point that the undertaking of the sureties is not to be extended beyond its terms.

In *Morris* v. *Van Voast* (19 *Wend.* 283), the court give a construction to the language of a statute similar in its terms to that of the sheriff's bond. The action was trespass against a sheriff. The defendant pleaded that he took the property by virtue of a writ of replevin, setting up the short statute of limitations. The court, by Nelson, Ch. J., held that the statute only extended to acts done *virtute officii;* that if the sheriff was a trespasser the act must be deemed done *colore officii,* and that the statute was therefore no bar. *Seely* v. *Birdsall* (15 *John.* 267), was an action for a false return, which was held to be local because it was an act done *virtute officii.* Spencer, Ch. J., said, "the true distinction was between an act done *colore officii* and *virtute officii.* In the former case, the sheriff is not protected by the statute when the act is of such a nature that his office gives him no authority to do the act. But when doing the act within the limits of his authority, he exercises that authority improperly, or abuses the confidence which the law reposes in him, to such cases the statute extends."

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In the case of *Commonwealth* v. *Kennard* (8 *Pick.* 133), it was held that the owner of property might resist the officer who should attempt to seize it by virtue of an execution against another. Ch. J. Parker said, "We cannot distinguish between an officer who assumes to act under a void precept and a stranger who should do the same act without precept. An officer without precept is no officer in the particular case in which he so undertakes to act." So in *Alcock* v. *Andrews* (2 *Esp.* 540), which was an action against a constable for an assault and battery, who set up the six months' statute of limitations under the statute 24 Geo. 2, ch. 44. Lord Kenyon overruled the objection upon the distinction that the defendant acted *colore officii,* and not *virtute officii*— "that it had often been held that a constable acting *colore officii* was not protected by the statute. That when the act is of such a nature that the office gives no authority to do the act, in doing it he is not to be considered as an officer; but where a man doing an act within the limits of his official authority, exercises that authority improperly or abuses the discretion placed in him, to such

cases the statute extends. The distinction is between the extent and the abuse of the authority."

Now these are plain, obvious distinctions, and clearly applicable to this case. I admit that they have not in all cases been adhered to, but when they have been disregarded, it has generally been for the protection of public officers, and not for the purpose of extending their own liability or that of their sureties. In two or three states, sureties have indeed been held liable for the acts of their principals done *colore officii;* but these cases cannot be supported upon legal principles.

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The judgment of the supreme court should therefore be affirmed. RUGGLES, J., and HURLBURT, J., concurred.

Judgment reversed.

C. LIABILITY TO GOVERNMENT.

THE PEOPLE V. JOHR.

Supreme Court of Michigan. April, 1871.

22 Michigan 461.

CHRISTIANCY, J. This was an action of debt brought in the name of the People of the State against Johr and his sureties on a bond given by Johr as county treasurer of St. Clair county, to the Auditor-General, conditioned as provided by *section 877, Comp. L.,* substantially for accounting for and paying over all moneys said treasurer should receive for sales of lands for taxes at the annual tax sales in said county.

The declaration alleges, as a breach, the non-payment of seven thousand four hundred ninety and 88-100 dollars, by said Johr received as such treasurer, for the sale of lands for taxes at the annual tax sales in said county for the year 1866.

It was admitted on the trial, by stipulation, that on the 2nd November, 1866, said Johr, as treasurer of said county, had in his possession seven thousand four hundred and 99-100 dollars which belonged to and was the property of, the plaintiffs, and received by him in the manner and for the purposes set forth in the declaration, and that no part of the same had been paid to the State Treasurer.

The bond appears to have been approved by one Circuit Court Commissioner of said county, and this approval only was alleged in the declaration. But there was no approval by the Prosecuting Attorney, or the other Circuit Court Commissioner shown, nor was there any express approval by the Auditor General upon the bond; but as produced on the trial it contained the following indorsement:

"Official bond H. Johr, Treasurer of St. Clair county, to the Auditor General, 1865 and 1866, $20,000, recorded and filed May 30th, 1865. S. D. Bingham, Deputy Auditor General." This bond, when offered in evidence, was first admitted, subject to objection, and the stipulation above referred to having been read, the plaintiffs rested. After an offer by the defendant to prove that Johr, the treasurer, had been feloniously robbed of the money in question, had been overruled, the court, recurring to the bond which had been admitted subject to objection, excluded and withdrew it from the consideration of the jury, on the ground that it was not executed and approved according to the statute, and that this action, therefore, could not be maintained. This presents the main question in the case; but before considering this we will first dispose of some preliminary questions raised by the defendants in error.

It is objected that there was no evidence that the bond had ever been delivered to, or filed with the Auditor General, and that the indorsement on the bond of its filing and recording in the Auditor General's office, signed by S. D. Bingham, Deputy Auditor General, is no evidence that it was part of the records of the Auditor General's office.

As to the delivery of the bond to the Auditor General and his approval and acceptance of it, it is proper to notice that by the next section of the statute (*Comp. L., Sec. 878*), the county treasurer was not to be allowed to sell lands for taxes without first giving the bond provided for by the preceding section, and upon failure to give it the Auditor General was to employ some other person to make the sale, and the county treasurer having, after the giving of this bond, actually sold the land and received the money, the inference must be very strong that he was allowed to do so on the faith of this bond, and that the same must therefore have been delivered to, accepted and approved by the Auditor General. See *Bank* v. *Dandridge,* 12 Wheat., 81. But whether it was competent, under such circumstances, for the defendants to deny the delivery when produced by the attorney for the People, we need

not decide. There was no affidavit of the defendants below, or any of them, filed under the 79th Rule of the Circuit Court, denying the execution of the bond, and we think under this rule the delivery constitutes a part of the execution, that the execution includes delivery, by which alone the instrument, though signed, can become effectual. Under the rule, therefore, the delivery was admitted.

As to the indorsement of S. D. Bingham, Deputy Auditor General, he being a State officer, known to the law, we are bound to take judicial notice that he was such officer, and the indorsement or certificate by him has the same force and validity as if signed by the Auditor General himself. This also shows an approval and acceptance by the Auditor General.

There was therefore no legal objection to the introduction of the bond, unless it was properly excluded on the ground, that the sureties not being approved by the Prosecuting Attorney and the other Circuit Court Commissioner for the county, as required by section 877, the bond could not be sued upon *as a statute bond*, and, as claimed by the defendant in error, that a suit could only be maintained upon it as a common law bond, in which case, as it is insisted, the suit must be brought in the name of the obligee, the Auditor General, and not in that of the People, as might be done if the bond had been approved as required by the statute.

It may be admitted, for the purposes of this case, that unless, *as between* the *People* and the *defendants*, this can be treated as a statute bond, the action should have been brought in the name of the obligee. Such seems to be the general current of authority,—a doctrine, however, which when applied to cases where the bond is valid, and was evidently intended by the parties for the same purpose as that required by the statute, savors more of technicality than of justice or common sense.

It is doubtless true that without the approval of the Prosecuting Attorney and the other Circuit Court Commissioner, the Auditor General might have refused the bond, and declined to allow the county treasurer to make the tax sales, and it may be admitted that, as between the Auditor General and the people, it was his duty to have done so, and to have appointed another person to make the sales. But the precise question here is, whether the county treasurer, who, on the faith of this bond, was allowed to make the sale and receive the money, or his sureties, can now be heard to make the objection, that the bond executed by them and received and accepted by the Auditor General, as and for the bond

required by the statute, and on the faith of which he has allowed the treasurer to sell the lands and receive the money, was not approved by all the officers whose approval it was the duty of the treasurer to have obtained. For whose benefit and for what purpose did the statute require the approval by the officers mentioned? Certainly not for the benefit or protection of the county treasurer or his sureties, but solely for the security and protection of the public, that the state might not be in danger of losing the public funds by insufficient sureties. And after the county treasurer and his sureties have had all the benefits they could possibly have enjoyed had the approval been obtained, it is not for his sureties even, (much less for him), to object that the state or its officers should have exercised more caution in ascertaining their sufficiency as sureties; for this, upon final analysis, is the whole force of the objection,—the bond itself, *in all its provisions*, being in strict compliance with the statute.

Such we think must be the result both upon logical and legal principles. It is so well settled, as long ago to have become a maxim of law, that any one may waive the benefit of a provision of a law, or a contract introduced for his own benefit.

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And though, as between the People of the state and the Auditor General, the latter may have had no right to waive the required approval of the sureties in this case, yet when the People in their corporate capacity sue upon the bond, under the circumstances of this case, there is no principle of justice or common sense, and we are aware of no principle of law which prohibits them, so far as the defendants are concerned, from waiving the approval, or which can give the defendants the right to insist upon it for the purpose of defeating their liability.

We have seen but one case which clearly conflicts with the reasoning we have adopted—*Crawford* v. *Meredith et al.*, 6 Geo. 552, —a case which, so far as we can judge from the report, does not seem to have been very carefully considered.

We think, therefore, the bond in this case, as between the People and the defendants, is to be treated in all respects as a statute bond, and that the Circuit Court erred in excluding it from the jury.

The judgment must be reversed, with costs, and a new trial awarded.

The other Justices concurred.

See Speed v. Detroit, 97 Mich. 198, *supra*, holding that mandamus will issue to force the approval of an official bond.

STEPHENS V. CRAWFORD, GOVERNOR, USE OF WARD.

Supreme Court of Georgia. November, 1846.
1 Georgia Reports 574.

By the Court—NISBET, Judge.

This is an action on a sheriff's bond, to charge the sureties for a default of their principal, and the first question made is, whether the admissions of the principal can be given in evidence to charge them?

We think they are *prima facie* evidence of their liability, and cast the onus upon them.

This court has determined that a decree against a guardian upon a bill suggesting a *devastavit* to which they were not parties, is no more than *prima facie* evidence against the sureties—they can inquire into the grounds of the decree *ab origine*. With stronger reason the admission of a principle is only *prima facie* evidence. The surety may show in rebuttal, that the admission was made by the sheriff by mistake—or collusion with third persons for the purpose of charging them—or any other fact which demonstrates that the money received by him was not guarantied to be paid over by them. Any other rule would be unjust to them.

It is, however, reasonable and according to the settled practice of the courts, that his admission should go against them as *prima facie* proof of liability. They would be conclusive upon himself, if *bona fide* made, and will bind the sureties, because they are his privies in law. It is not to be presumed that one will charge himself falsely—the legal presumption is that they are true until the contrary appears. With these qualifications, we think the testimony was properly admitted. 2 Baily, 380, 381; 5 Binney, 184; 1 Starkie, 189, 223, 243; 3 McCord, 412.

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We have now arrived at the point where, as we suppose, all the other assignments of error may be summarily comprehended in two positions, taken in the argument by the counsel for the plaintiff in error. These positions are:

1st. That the bond upon which the plaintiff's action is founded, to-wit, the second bond given by Stephens, the sheriff, and dated on the 3d of March, is not valid as a statutory bond; and therefore the plaintiff is not entitled to recover.

2d. It is not valid as a voluntary or common-law bond, and therefore the plaintiff cannot recover.

We hold that the remaining points, no matter how originating or how stated, must necessarily be considered and adjudicated, in our discussion of, and opinion upon, these propositions.

Both of these positions were determined against the plaintiff in error in the court below.

1st. Is this a valid bond, under the statutes of Georgia?

By the act of 1809, (Prince, 177,) it is made the duty of the sheriff elect to apply for his commission within twenty days from his election; and to take the oath of office and give bond within ten days after being notified of the arrival of his commission, by the act of 1811, (Prince, 178). By the act of 1823, (Prince, 183), if he does not qualify and give bond within the time prescribed by the two before-recited acts, that is, within thirty days, his office is declared vacant and ineligible.

In view of these statutes it is argued, that this is not a valid bond, because *first*, not being given within thirty days, the office was vacant, and the sheriff could not therefore have given it under the statute.

Now, it is true that unless the Legislature has declared that unless bond is given within thirty days, the office shall be considered as vacant.

The object of this requirement is to secure the early services of an officer under bond, and the execution of the bond is a condition precedent to the enjoyment of the office; it perfects, so to speak, the sheriff's title to it. A default here works a forfeiture, against which the Inferior Court cannot afterwards relieve.

If there was no bond executed in this case, then was the office forfeited, and once a forfeiture always a forfeiture. The Inferior Court, in that event, could not have regarded him as a sheriff; he could not have tendered and they could not have received a bond, *colore officii*. But was there no bond given within time?

The record discloses that there was a bond executed by the sheriff Stephens, to the governor of the State, on the 11th January, 1840; and therefore within time. Whether that bond be valid or not, does not devolve upon us to determine. It has not so far as appears to us judicially, been declared invalid by any court having jurisdiction over it. The Inferior Court has not declared it void by declaring the office vacant, and ordering a new election. We only know the fact that a bond was executed within time, and from aught that appears, that it is a good bond, and that the sheriff

is properly in office. We cannot therefore say that the bond sued on is not a valid statutory bond, for the reason that the office was vacated.

2d. It is argued that it is not a good statutory bond because not having been taken within time, it is not taken according to the requirements of the statute.

It is insisted, that after the expiration of the time, it is not competent for the Inferior Court to demand a bond of the sheriff; that their power to take it is limited, as to time, by the statute; and that this bond, bearing date after the expiration of the prescribed time, cannot, in any sense, be considered as taken in conformity with the law. We consider this position impregnable. It is true, as claimed by learned counsel for the defendant in error, that if a bond, required by statute, departs from its strict provisions, as where the penalty is larger than that named in the act, it is notwithstanding good, so far as it is in conformity with it; unless the statute expressly declares that all bonds, not taken in conformity with its provisions, shall be void.

This proposition, as a rule of law, has an exception in the case of a bond intended to operate as a fraud upon the obligors, by color of the law, or as an evasion of the statute. 2 *Baily*, 376; 2 *N. & McCord*, 425; 2 *McCord*, 107; 6 *Binney*, 298. But this case does not fall within the doctrine last stated. This is not the case of a bond in part conformed to a statute, and valid, as to that part, and void as to the remainder of its obligations. It is a bond required by the Legislature to be taken within a time limited, and not taken beyond that time.

The act requiring it to be taken within thirty days restricts the agent, viz., the Inferior Court, to that time; they cannot enlarge their powers. If they can defer a demand for the bond until one day after the time, they may a hundred, and thus defeat the intent of the Legislature altogether.

If the court has the power to demand a bond in this case, I see no reason why the right should not equally exist, in a case where there was confessedly a forfeiture of his office. But could they by asking, and the sheriff by giving a bond, where none had been given in time, revoke the forfeiture of his office? Clearly not. Besides, if they in such a case may be considered as, under the law, entitled to call upon him for a bond, he must have the reciprocal right to give one, and thereby retain an office which his previous default has vacated. Besides, having given one bond, the sheriff has complied with the condition upon which he is to hold office,

and the court has no right to cast burdens upon him which the law does not impose.

These views are intended to illustrate the position that this cannot be regarded as a statutory bond. We do not find that this conclusion is much strengthened by the fact which counsel for the plaintiff in error seemed to regard as of some importance, that there was no *dedimus potestatem*, to the Inferior Court to take this bond.

If the law does not confer the power, the executive *dedimus* cannot give it, and if it does, then the *dedimus* is but a wasteful surplusage. We have seen that the Legislature has conferred it, but, as we have attempted to show, to be exercised within a limited time.

What further remains is to inquire whether this be a valid bond at common law? We think it is. We recognize the position occupied by the counsel, that to be good as a voluntary bond, it must have all the incidents of a deed; it must be signed, sealed, attested and *delivered*. One of these incidents, to-wit, delivery, it is said, is wanting. The bond is made payable to Charles J. McDonald, Governor of the State of Georgia, and his successors in office, and the argument is, that it was not delivered to Charles J. McDonald. We cannot see that it was necessary.

In considering the question, whether it be, or not, a good voluntary bond, we must look to the circumstances under which, and the character in which, it was given. A bond made to A and delivered to B is void for want of delivery. That is, however, not this case. The obligor, Stephens, is the sheriff of Baldwin county; as sheriff he goes to the Inferior Court, and suggesting that his previously executed bond was considered void by some, of his own mere notion tenders to them an additional bond, which they accept. The act was voluntary. It does not appear that the court, *virtute officii*, as agents of the State, considered the previous bond void, and asked a new one, or used any means, by suggestion, threats, or otherwise, to get it. The evidence is that he of his own accord tendered it.

Now it does seem to me that it does not lie in the mouth of this obligor to object to the validity of this bond. He is estopped, and so are his securities; for their assumption of the obligations of the bond was also voluntary, and they are his privies in law. What can they say against the breach of a contract thus intelligently, willingly and honestly made? Nothing. They must lie down under the burdens they have assumed.

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We have said that after the expiration of thirty days, the Inferior Court has no right or power to *demand* an additional bond from the sheriff. Whilst this is true, we yet hold it was competent for them, in their official character, and with a view to secure the faithful execution of the duties of the sheriff to *receive* an additional bond from him, when voluntarily tendered; and, when so received, the rights under it inure to the parties interested, as in case of the first bond. The security is cumulative. Their original power to receive a bond is continued, in cases where the law being complied with and the sheriff in office he in that character tenders other securities.

In this view of it the bond would seem to be statutory. As to the obligors, it is unquestionably voluntary.

Taking into view the circumstances under which it was made; the character of the obligor, and also of those to whom it was delivered; we can give it no other designation than this, to-wit, a common-law bond. And being delivered to the Inferior Court and attested by them, and found where the law directs it to be placed—in the custody of the clerk of the Superior Court—we are of the opinion that the presiding judge committed no error in admitting a certified copy of it to go in evidence.

Let, therefore, the judgment of the court below be affirmed.

CITY OF CHICAGO V. GAGE.

Supreme Court of Illinois. May, 1880.

95 Illinois Reports 593.

An action of debt was brought in the circuit court of Cook county by the city of Chicago against David A. Gage, late treasurer of the city of Chicago, and John B. Sherman and others as sureties upon what was alleged to be the official bond of said Gage, to recover a sum of money which it was alleged he had refused to pay over to his successor in office. Pleas of *non est factum* were filed by all of the defendants and verified by a part of the sureties. Issues were formed thereon, and upon the breaches assigned, by proper pleas, and upon the issues thus formed a trial was had in the circuit court resulting in a verdict against the defendants for $1,000,000 debt, the penalty of the bond, and $507,703.58 dam-

ages, upon which judgment was rendered. The defendants took the case to the Appellate Court for the First District, where the judgment was reversed, and the city appealed from the judgment of the Appellate Court to this court.

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Mr. Justice SHELDON delivered the opinion of the Court:

It is insisted by appellants that the instrument in question is a nullity as to the sureties, they having signed it with the blanks in it which it had, and those blanks being subsequently filled without their consent or knowledge, and the case of *The People* v. *Organ*, 27 Ill. 29, is referred to in support of the position. That case does decide, that the filling the blank in a bond with the amount of the penalty, after the sureties had executed it, without their knowledge or consent, rendered it void, as to them. But that decision was made under, and in conformity to, the ancient doctrine of the common law that an authority to execute a sealed instrument for another must be of as high a character as the instrument, and therefore that a parol authority was not adequate to authorize an alteration or addition to a sealed instrument; the decision recognizing as the rule that a paper signed and sealed in blank, even with verbal authority to fill the blank, which is afterwards done, is void as to the parties so signing and sealing, unless they afterwards deliver, or acknowledge, or adopt it.

. . . . . .

These authorities declare the now prevailing rule upon this subject, and the reasons of the rule. They sufficiently show that the courts have entirely drifted away from the decision in the case of *The People* v. *Organ*. Or rather, perhaps, it may more properly be said, that the old technical rule of the common law upon which that decision was based has become overborne in operation, in this respect at least, of filling blanks in official bonds, by the application of the doctrine of estoppel *in pais*, a principle, at least in its present broadness of scope, of modern growth. The first distinctive enunciation in England of the branch of estoppel, known as estopped by conduct, is said to have been in *Pickard* v. *Sears*, 6 Ad. & E. 469, and in this country in *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480. See Bigelow on Estoppel, 473, 476.

This court has since departed from that case of *The People* v. *Organ*, and placed itself in harmony with the class of authorities which have been cited.

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Appellees claim that there was notice here on the part of the

city of the secret understanding of the sureties, or one of them, that the penalty of the bond was not to be more than $250,000. If such were the facts we would agree with them as to the fatal effect. The disagreement is in regard to what facts will constitute such notice.

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It is in reality a question of good faith,—whether these blanks in the bond indicated the existence of the secret understanding as to the amount of the penalty, and should have put the obligee upon inquiry whether the sureties consented to the delivery of a bond with a larger penalty than $250,000. We do not think such a circumstance as the blanks in the bond was in any way indicative of such a secret understanding, or excited any suspicion of its existence, or put the obligee upon any inquiry as to such an understanding and we must believe the obligee acted in entire good faith in taking the bond.

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Another point which is made against the validity of the bond is, that failure to file a bond within fifteen days after the canvass vacated the office therein described, and thereupon all liability under the bond terminated.

The position is, that the provision requiring a bond to be filed by the treasurer elect within fifteen days after the official canvass has been declared is mandatory, and that a failure to file the bond within that time *eo instanti*, upon the termination of the time, absolutely vacates the office.

It is insisted on the contrary, that the sections of the charter on this subject taken together were intended merely to empower the mayor and council, in their discretion, to declare a vacancy and appoint a successor, or to waive the default as to the mere time of filing bond, and to accept and approve it when afterwards filed; therefore, a failure to file in time does not, of itself, annul or avoid the right or title to the office, but merely renders it voidable or defeasible. That if the officer files his bond strictly in time, his right and title to the office are indefeasible. If he files it afterwards, and it be accepted and approved, his right and title become thereupon equally indefeasible.

This latter seems a reasonable construction, and is one which we are disposed to adopt. Gage derived his title to the office from the election. The law does not favor forfeitures and "in enforcing forfeitures courts should never search for that construction of language which must produce a forfeiture, when it will bear another

reasonable construction." *Hartford Ins. Co.* v. *Walsh*, 54 Ill. 168.

Suppose the filing of the bond within the fifteen days had been prevented by some inevitable accident, but the very next day after the officer filed his bond, which was accepted and approved—in reason, why should not that suffice, and the officer have right to the office for the term for which he was elected? The aim of the statute would be fulfilled. The object of the statute was not a change of person to hold the office, but to secure an official bond. That having been given, the person whom the people had elected would seem the more proper person to have the office, than one appointed by the mayor and council.

It is conceded that after the expiration of the fifteen days the mayor and council would have been fully justified in refusing to accept and approve this bond, because of this default; and in appointing Gage's successor, as in the case of *Ross* v. *The People*, 78 Ill. 375. Had they so elected Gage's right to the office would have been forfeited, and a person appointed would give a bond. But (in theory at least) the rights and interests of the public were made equally secure by electing to waive the right of forfeiture and accepting and approving the bond in suit, after the fifteen days.

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There are numerous authorities that a provision of law, that an officer shall give bond within a prescribed time after his election, is directory only. *The People* v. *Holly*, 12 Wend. 480; *State* v. *Churchill*, 41 Mo. 41; *State* v. *Porter*, 7 Ind. 204; and see *Kearney* v. *Andrews*, 2 Stock. Ch. 70, *Speake* v. *United States*, 9 Cranch. 28. The other clauses in the charter, "he shall be deemed to have refused said office and the same shall be filled by appointment," or, (if held to apply here), "the office shall become vacant," it may be held do not change the rule, as the following authorities show, in the case of words even more explicit than these.

In *State* v. *Toomer*, 7. Rich. (Law), 216, the statute required the master in chancery, within three weeks after his election, to tender his bond for approval, and upon its approval, to deposit it with the treasurer and sue out his commission, and that "upon his neglect or failure to do so within the said time, his office shall be deemed absolutely vacant, and shall be filled by election or appointment, as heretofore provided."

But the court held that the failure to comply with this requirement was only cause of forfeiture, but not a forfeiture *ipso facto*. That by a strict compliance with the terms of the statute, the title

of the office was protected against forfeiture, "and that if the State sees proper to excuse his delinquency by granting him his commission, the defects of his title are cured. and it is converted into a title *de jure,* having relation back to the time of his election."

In *Sprowl* v. *Lawrence,* 33 Ala. 674, the statute required the sheriff to file his official bond in the office of the probate judge, before entering upon the duties of his office, and within fifteen days after his election. The statute also expressly declared that if he failed to file his bond within the time prescribed by law, he vacated his office. The court there say: "By virtue of his election, Duncan was sheriff, so far as his mere right to the office was concerned, before he executed his bond. . . . . The election therefore having invested him with his title to the office, the statute requiring him to file his bond within fifteen days, and providing that on his failure to do so he 'vacates his office' operates as a defeasance, and not as a condition precedent," and concluding as follows: "Our conclusion is, that the failure of a legally elected sheriff to file his bond within the time prescribed, does not, by its unaided force, operate his instantaneous removal from office; and that a bond executed by him more than fifteen days after his election, and before any steps or proceeding on the part of the State to effect his amotion, must be considered as the bond of an 'officer' within the meaning of section 132 of the code," that is, of an officer *de jure.*

It is suggested by appellee's counsel that this last case has been overruled by that of *State ex rel.* v. *Tucker,* 54 Ala. 205. But upon examination we understand this to be so only in part, that is, in so far only as the former case seemed to require a judicial ascertainment of the vacancy before the appointment of a successor could be made.

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On November 20, 1871, the canvass of the votes was made and the common council declared Gage elected, and on the 27th of the same month he took and filed his oath of office. Although he had taken steps towards procuring his proposed bond, and had obtained the names of those who were willing to become his sureties, he failed to perfect it and to file it with the city clerk within the fifteen days, but neither the mayor nor the council either declared the office vacant, or appointed his successor, and when afterwards he did present his perfected bond, they accepted and approved it. Upon the faith of the security of this bond he held and enjoyed the office for the full term of two years, and was intrusted with the public

moneys. The apparent implied authority with which the sureties had clothed Gage to make use of and deliver this bond as his official bond, by signing and sealing the same and leaving it with him, was a continuing authority, until some step was taken by the sureties towards its revocation.

Not a step was taken in that direction.

We do not think the sureties have the right now to set up in defeat of the bond that it was accepted and approved and filed with the city clerk within the fifteen days prescribed in the charter.

Another question arises upon the ruling of the Circuit Court in excluding questions put to Gage when on the stand as a witness, as to whether certain balances were in his hands, as treasurer, at specified dates. He was asked whether the balance of $519,508.07, which appeared charged against the city treasurer on December 4th, 1871, the day of the commencement of his second term, was at that time actually in his hands. The same question was put with reference to December 11, 1871, and January 11, 1872. He was also asked whether the balance appearing to be in his hands December 16, 1873, of $507,703.58, was at that time actually loaned out for the benefit of the city of Chicago. The questions were all excluded and exception taken.

Gage was his own successor in office. It was his duty as incoming treasurer to receive the treasury balance from his predecessor. If he entered it in his treasury books after the beginning of his second term as having actually come to his hands from his predecessor, and continued afterward from time to time to return and report the same as in his hands, both he and his sureties, we think, should now be concluded from denying that this balance did actually come into Gage's hands as treasurer. The law transferred any balance on hand to his second term.

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As respects Gage himself, it would seem to be quite clear that these statements of his of the treasury balances in his hands should be conclusive upon him.

It is a familiar principle that a public officer making a return of his doings upon a writ shall not be allowed to gainsay the truth of it. *Barrett* v. *Copeland*, 18 Vt. 67; *Hoyne* v. *Small*, 22 Me. 14; *Sheldon* v. *Payne*, 3 Seld. 453.

The principle upon this subject is laid down in *Cave* v. *Mills*, 7 Hurls. & Norm. 913.

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And we are of opinion that the sureties should be equally concluded here with Gage himself.

Commissioners v. *Mayrant*, 2 Brevard 228, was a suit on a sheriff's official bond. During his term of office the sheriff wrongfully endorsed a levy of a sum of money upon an execution in his hands and returned the execution with the levy thereon, and failed to pay over the money. The sureties on the bond were held to be responsible for the amount returned as levied by the sheriff, although the same was not in fact levied. It was said the sheriff's return was an official act which bound him officially and made his sureties liable.

In *McCabe* v. *Raney*, 32 Ind. 309, a suit against principal and sureties, joint makers of a promissory note, the principal having, by his statements to the purchaser of the note that there was no defence to it, precluded himself from setting up a defence to the note, his sureties were held also precluded, the court saying, "Any act of the principal which estops him from setting up a defence, personal to himself, operates equally against his sureties."

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In *Baker* v. *Preston*, 1 Gilmer (Va.) 235, an action upon a State treasurer's official bond, it was decided that the books kept by the treasurer were conclusive evidence of the balance actually in the treasury at any given time, both against the treasurer and his sureties, without being pleaded as an estoppel, so as to charge them with balances carried forward from year to year as if those balances were actually on hand.

In *The United States* v. *Girault et al.*, 11 How. 27, a suit on the official bond of a receiver of public moneys, the breach assigned was, that on the 2d day of June, 1840, Girault, as such receiver, had received a large amount of public money, to-wit: the sum of $8,952.37, which he had refused to pay to the United States.

To this breach the sureties pleaded: That on the 2d day of June, 1840, and on divers days before that day, the said Girault gave receipts as receiver for moneys paid on the entry of certain lands therein specified, and returned the same to the treasury department to the amount of $10,000 and of which the amount in the declaration mentioned was part and parcel. And that neither the $10,000, nor any part thereof, was paid to or received by him, the said Girault.

The plea was held bad on general demurrer. The court say: "The condition of the bond is, that Girault shall faithfully execute and discharge the duties of his office as a receiver of the public moneys. The defendants have bound themselves for the fulfillment of these duties; and are, of course, responsible, for the very fraud

committed upon the government by that officer, which is sought to be set up here in bar of the action on the bond.

As Girault would not be allowed to set up his own fraud for the purpose of disproving the evidence of his indebtedness, we do not see but that, upon the same principle, they should be estopped from setting it up as committed by one for whose fidelity they have become responsible." And see *Morley* v. *The Town of Metamora*, 78 Ill. 394; *Evans* v. *Keeland*, 9 Ala. 42.

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The question as to the balance shown by the record in Gage's hands December 16, 1873, being loaned out for the benefit of the city, is liable to the further objection that its tendency, if answered affirmatively, would be to prove a breach of the bond in that respect. Under the charter the treasurer was required "to keep safely without loaning or using" the city money, and was permitted to deposit it at interest only by the authority of the common council manifested by ordinance or resolution, and in the manner prescribed by the charter. There is no pretence that such authority was ever given; on the contrary, there is evidence tending to show that it was not given.

We find no material error in the ruling of the Circuit Court upon the admission or exclusion of evidence.

The judgment of the Appellate Court is reversed and the cause remanded, with directions to enter a judgment of affirmance of the judgment of the Circuit Court.

Judgment reversed.

DICKEY, J., took no part in the decision, having been of counsel in the case in the Circuit Court.

See also Boone Co. v. Jones, 54 Iowa 699, *supra*, holding that neither an officer nor the sureties on his official bond may be heard in a suit on his bond to impeach his title to office.

UNITED STATES V. THOMAS.

Supreme Court of the United States. December, 1872.
15 Wallace 337.

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Mr. Justice BRADLEY delivered the opinion of the court.

This case brings up squarely the question whether the forcible seizure, by rebel authorities, of public moneys in the hands of loyal government agents, against their will, and without their fault or

negligence, is, or is not, a sufficient discharge from the obligations of their official bonds. This precise question has not as yet been decided by this court. As the rebellion has been held to have been a public war, the question may be stated in a more general form, as follows: Is the act of a public enemy in forcibly seizing or destroying property of the government in the hands of a public officer, against his will, and without his fault, a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty, and to have the property forthcoming when required?

The question is thus stated in its double aspect, namely: first, in regard to the obligation arising from official duty; and, secondly, in regard to that arising from the bond, because the condition of the latter is twofold,—that the principal shall faithfully discharge his official duties, and that he shall pay the moneys of the government that may come into his hands as and when it shall be demanded of him. It is contended that the latter branch of the condition has a more stringent effect than the former, and creates an obligation to pay, at all events, all public money received.

That overruling force arising from inevitable necessity, or the act of a public enemy, is a sufficient answer for the loss of public property when the question is considered in reference to an officer's obligation arising merely from his appointment, and aside from such bond as exists in this case, seems almost self-evident. If it is not, then every military commander who ever lost a battle, or was obliged to surrender his ship or fort, or other public property, added a civil obligation to his military misfortune. And as it regards this question, it is difficult to perceive any distinction between the loss of one kind of property and another. If the property belongs to the government, the loss falls on the government; if it belongs to individuals, it falls on them.

The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulation.

The ordinary rule will be found illustrated by a number of analogous cases.

It is laid down by Justice Story that officers of courts having the custody of property of suitors are bailees, and liable only for the exercise of good faith and reasonable diligence, and not responsible for loss occurring without their fault or negligence.* Trustees are only bound to exercise the same care and solicitude with regard to the trust property which they would exercise with regard to their own. Equity will not exact more of them.† They are not liable for a loss by theft without their fault.‡ But this exemption ceases when they mix the trust-money with their own, whereby it loses its identity, and they become mere debtors.§ Receivers, appointed by the court, though held to a stricter accountability than trustees, on account of their compensation, are nevertheless not liable for a loss without their fault; and they are entitled to manage the property and transact the business in their hands in the usual and accustomed way.|| A marshall appointed by a court of admiralty to take care of a ship and cargo is responsible only for a prudent and honest execution of his commission.¶ "Every man," says Sir Walter Scott, "who undertakes a commission incurs all the responsibility that belongs to a prudent and honest execution of that commission. Then the question comes, What is a prudent and honest execution of that commission? The fair performance of the duties that belong to it. . . . . He must provide a competent number of persons to guard the property; having so done he has discharged his responsibility, unless he can be affected with fraud, or negligence amounting in legal understanding to fraud.** A postmaster is bound to exercise due diligence, and nothing more, in the care of matter deposited in the postoffice. He is not liable for a loss happening without his fault or negligence. Soon after the organization of the

*Story on Bailments, § 620.

†Story on Bailments, § 620; Lewin on Trusts, 332, 3d ed.

‡Ib.

§Ib. and 2 Story's Eq. Juris., § 1270, and see §§ 1268, 1269; also 2 Spence's Eq. Juris., 917, 921, 933, 937; Wren v. Kirton, 11 Vesey, 381; Utica Ins. Co. v. Lynch, 11 Paige, 520.

||Knight v. Lord Plymouth, 3 Atkyns, 480; Rowth v. Howell, 3 Vesey, 566; Lewin on Trusts, 332, 3d ed.; Edwards on Receivers, 573-599; White v. Baugh, 3 Clark & Finnelly, 44.

¶The Rendsberg, 6 Robinson, 142.

**6 Robinson, 154; see also Burke v. Trevitt, 1 Mason, 96, 100.

government post it was attempted to charge the Postmaster-General to the same extent as the common carriers who had previously carried the mails; and the question was elaborately argued in the great case of *Lane* v. *Cotton et al.*, 1 Lord Raymond 646, and Lord Chief Justice Holt strenuously contended for that view; but it was decided that the postmaster was only liable for his own negligence; and this case was followed by Lord Mansfield and the whole court, three-quarters of a century later, in the case of *Whitfield* v. *Le Despencer,* Cowper 754; see Story on Bailments, § 463; *Dunlop* v. *Munroe,* 7 Cranch 242.

In certain cases, it is true, a more stringent accountability is exacted; as in the case of a sheriff, in reference to prisoners held by him in custody, where the law puts the whole power of the county at his disposal and makes him liable for an escape in all cases, *except* where it is caused by an act of God or the public enemy. 33 Hen. IV, p. 1; Brooke's Abridgment, tit. Dette, 22; *Dalton's Sheriff,* 485; Watson on Sheriffs, 140. The exception which thus qualifies the severest exaction of official responsibility known at the common law is worthy of particular notice. The reason for applying so severe a rule in cases of escape is probably founded in motives of public safety. Chief Justice Gibson, in *Wheeler* v. *Hambright,* 9 Sergeant & Rawles 396, says: "The strictness of the law in this respect arises from public policy." Lord Chief Justice Holt, in his dissenting opinion in *Lane* v. *Cotton,* also held that the sheriff was responsible in the same strict manner for goods seized in execution; but he cited no authority for the opinion, and the general rule of responsibility is certainly much short of that.

The basis of the common-law rule is founded on the doctrine of bailment. A public officer having property in his custody in his official capacity is a bailee; and the rules which grow out of that relation are held to govern the case. But the legislature can undoubtedly, at its pleasure, change the common-law rule of responsibility. And with regard to the public moneys, as they often accumulate in large sums in the hands of collectors, receivers, and depositaries, and as they are susceptible of being embezzled and privately used without detection, and are often difficult of identification, legislation is frequently adopted for the purpose of holding such officers to a very strict accountability. And in some cases they are spoken of as though they were absolute debtors for, and not simply custodians of, the money in their hands. In New York, in the case of *Muzzy* v. *Shattuck,* 1 Denio 233, the court, after a care-

ful examination of the statutory provisions respecting the duties and liabilities of a town collector, came to the conclusion (contrary to its previous decision in *The Supervisors* v. *Dorr*, 25 Wend. 440), that he was liable as a *debtor*, and not merely as a *bailee*, for the moneys collected by him, and consequently that he could not excuse himself, in an action on his bond, by showing that, without his fault, the money had been stolen from his office.

Where, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility. The mere prescription of duties has nothing to do with the question as to what shall constitute the rule of responsibility in the discharge of those duties, or a legal excuse for the nonperformance of them, or a discharge from their obligation. The common law, which is common reason, prescribes that; and statutes, in subordination to their terms, are to be construed agreeably to the rules of the common law.

The acts of Congress with respect to the duties of collectors, receivers, and depositaries of public moneys, it must be conceded, manifest great anxiety for the due and faithful discharge by these officers of their responsible duties, and for the safety and payment of the moneys which may come to their hands. They are expressly required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or in their possession or custody, till ordered by the proper department or officer to be transferred or paid out; and where such orders for transfer or payment are received faithfully and promptly to make the same as directed. 9 Stat. at Large, 61, § 9. To obviate all excuse for casual losses, it is provided that they shall be allowed, under the direction of the Secretary of the Treasury, all necessary additional expenses for clerks, fire-proof chests or vaults, or other necessary expenses of safekeeping, transferring, and disbursing said moneys. 9 Stat. at Large, 62, § 13. And it is expressly made embezzlement and a felony, for an officer charged with the safekeeping, transfer and disbursement of the public moneys. to convert them to his own use, or to use them in any way whatever, or to loan them, deposit them in bank, or to exchange them for other funds except as ordered by the proper department or officer. 9 Stat. at Large, 63, § 16. Every receiver of public money is required to render his ac-

counts quarter-yearly to the proper accounting officers of the treasury, with the vouchers necessary to the prompt settlement thereof, within three months after the expiration of each quarter, subject, however, to the control of the proper department. 3 Stat. at Large, 723, § 2. Besides this, all such officers are required to give bonds with sufficient sureties for the due discharge of all these duties. 1 Stat. at Large, 705; 2 Id. 75; 9 Id. 60, 61, &c. And upon making default and being sued, prompt judgment is directed to be given, and no claim for a credit is to be allowed unless it has been first presented to the accounting officers of the treasury for examination and disallowed, or unless it be shown that the vouchers could not be procured for that purpose, by reason of absence from the country, or some unavoidable accident. 1 Stat. at Large, 514, §§ 3, 4.

These provisions show that it is the manifest policy of the law to hold all collectors, receivers, and depositaries of the public money to a very strict accountability. The legislative anxiety on the subject culminates in requiring them to enter into bond with sufficient sureties for the performance of their duties, and in imposing criminal sanctions for the unauthorized use of the moneys. Whatever duty can be inferred from this course of legislation is justly exacted from the officers. No ordinary excuse can be allowed for the non-production of the money committed to their hands. Still they are nothing but bailees. To call them anything else, when they are expressly forbiden to touch or use the public money except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same. In the leading case of *The United States* v. *Prescott,* 3 How. 587 (which was an action on a similar bond to that now under consideration), the court say: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and the principles which are founded on public policy." After reciting the condition of the bond, the court adds, with a greater degree of generality, we think, than the case before it required, "The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond.'

This broad language would seem to indicate an opinion that the bond made the receiver and his sureties liable at all events, as now contended for by the government. But that case was one in which the defence set up was that the money, was stolen, and a much more limited responsibility than that indicated by the above language would have sufficed to render that defence nugatory. And as the money in the hands of a receiver is not his; as he is only custodian of it; it would seem to be going very far to say, that his engagement to have it forthcoming was so absolute, as to be qualified by no condition whatever, not even a condition implied in law. Suppose an earthquake should swallow up the building and safe containing the money, is there no condition implied in the law by which to exonerate the receiver from responsibility?

We do not question the doctrine so strongly urged by the counsel for the government, that the performance of an express contract is not excused by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and though beyond his control—with the qualification, however, that the thing to be done does not become physically impossible; as, to cultivate an island which has sunk in the sea. It was thus decided in the leading case of *Paradine* v. *Jane,* Aleyn 26; Metcalf on Contracts 212. . . . . .

It is contended that the bond, in this case, has the effect of such a special contract, and several cases of actions on official bonds have been cited to support the proposition. Those principally relied on are the cases of *Muzzy* v. *Shattuck,* 1 Denio 233; *Commonwealth* v. *Comly,* 3 Barr 372; *The State* v. *Harper,* 6 Ohio St. 607, and the recent cases of Dashiel, Keehler, and Boyden in this court. It must be conceded that the language used by the court, not only in the cases already referred to, but in some of the other cases cited, seems to favor the rule contended for. But in none of them was the defence of overruling necessity interposed. They were all cases of alleged theft, or robbery, or some other cause of loss, which would have been insufficient to exonerate a common carrier from liability. They all concur in establishing one point, however, of much importance, that a bond with an unqualified condition to account for and pay over public moneys enlarges the implied obligation of the receiving officer, and deprives him of defences which are available to an ordinary bailee; but they do not go the length of deciding that he thereby becomes liable at all events; although expressions looking in that direction, but not called for by the judgment, may have been used.

The case of *United States* v. *Prescott* has already been sufficiently adverted to. The next, in order of time, was that of *Muzzy* v. *Shattuck,* which was decided the same year, 1845, and in which the Supreme Court of New York construed the statutes of that State as making the town collector a *debtor* for the amount of taxes to be collected by him, and held him liable on his bond notwithstanding the money was stolen. Here again the result arrived at was correct; but the reasoning by which it was attained may be fairly questioned. The statutes of the State, however, may have justified the view which was taken in that case.

The next case is that of *Commonwealth* v. *Comly,* decided in 1846. That was an action on the bond of a collector of tolls, and the same defence (of theft) was interposed. Chief Justice Gibson refers to the case of *United States* v. *Prescott,* and remarks that "the responsibility of a public receiver is determined not by the law of bailment, which is called in to supply the place of a special agreement where there is none, but by the condition of his bond." So, in the case of *The State* v. *Harper et al.,* which was an action on the official bond of a county treasurer, conditioned for the payment of all moneys that should come to his hands for State, county or township purposes; and larceny of the money being pleaded, the court say: "By accepting the office the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do these acts;" and the defence of larceny was overruled.

It is unnecessary to examine the cases further in detail. It appears from them all (except perhaps the New York case) that the official bond is regarded as laying the foundation of a more stringent responsibility upon collectors and receivers of public moneys. It is referred to as a special contract, by which they assume obligations with regard to the safekeeping and payment of those moneys, and as an indication of the policy of the law with regard to the nature of their responsibility. But, as before remarked, the decisions themselves do not go the length of making them liable in cases of overruling necessity. . . . . .

So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring from such an instrument. The learned judges, in the great generality of the remarks made in some of the cases referred to, with regard to the liability of a re-

ceiving officer, and especially of his sureties, by virtue of his bond, have evidently overlooked what we conceive to be a very important and vital distinction between an absolute agreement to do a thing and a condition to do the same thing, inserted in a bond. In the latter case, the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. And this distinction, we think, affords a solution to the question involved in this case.

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Of course the above rule does not apply to a money bond given for a debt, where the condition is simply for the payment of a less sum of money than the penalty; for there, as the books say, the condition is of the same nature as the obligation itself, and not collateral to it. The bond in suit is not such a money bond. The condition of an official bond is collateral to the obligation or penalty; it is not based on a prior debt, nor is it evidence of a debt; and the duty secured thereby does not become a debt until default be made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is, not to pay a debt, but to perform a duty about and respecting certain specified property which is not his, and which he cannot use for his own purposes. In the case of *Farrar and Brown* v. *United States,* 5 Peters 373, the question being whether sureties were liable for defaults made prior to the giving of the bond, the court say: "for any sums paid to Rector (the principal) prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and that is the assumption that he still held the money in bank or otherwise. If still in his hands, he was up to that time *bailee of the government;* but on the contrary hypothesis he had become a *debtor* or *defaulter* to the government, and his office was already consummated." That is, as custodian of the money he is bailee of the government—not a debtor. What makes him a debtor or defaulter is the very question at issue. When he becomes such, then he and his sureties are liable until the amount is paid, as we held in the late case of Bevans, before referred to. Until then, neither he nor they are liable on the bond.

We think that the case is within the law as laid down by Lord Coke, and that the receiver, and especially his sureties, are entitled to the benefit of it; and that no rule of public policy re-

quires an officer to account for moneys which have been destroyed by an overruling necessity, or taken from him by a public enemy, without any fault or neglect on his part.

Judgment affirmed.

Justices SWAYNE, MILLER and STRONG dissented.

In some of the states the liability of an officer under bond is that of an ordinary bailee for hire. Where this rule is adopted he is liable only for negligence, even where the funds in his charge are stolen. Cumberland v. Pennell, 69 Me. 357; State v. Copeland, 96 Tenn. 296.

CHAPTER X.

THE MANDAMUS.

I. Character of Duty Whose Performance Will Be Enforced.

STATE EX REL. V. WHITESIDES.

Supreme Court of South Carolina. April, 1889.
30 S. C. 579.

Mr. Chief Justice Simpson.

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There is no serious dispute as to the main facts of the case, and these are sufficiently stated above. The difficulty, however, grows out of the legal questions raised, and these involve primarily a discussion of the law of *mandamus,* and its application to these conceded facts; and, secondly, the constitutionality of the recent act of the legislature, known as "An act to provide for the payment of township bonds, issued in aid of railroads in this State. Approved December 22, 1888." 20 Stat. 12. These questions will be considered in their order.

The principles which govern in *mandamus* cases, especially where the proceeding is against a public officer, are very plain and simple, and are within a very narrow compass; so much so as to need no elaboration here nor the citation of authorities. They may be briefly stated thus: Where a party has a legal right, to the enjoyment of which the discharge of a ministerial duty on the part of a public officer is necessary, and he has no other adequate remedy, in case the officer refuses to discharge this duty, *mandamus* is the proper proceeding. *High Ex. Leg. Rem.,* section 34 *et seq.* This writ was once a prerogative writ, and in England was supposed to issue at the instance of the crown, to meet and remedy otherwise remediless cases at his discretion. But in this country it has lost its prerogative character, and though issued in the name of the State, yet it belongs to the courts, and has become a form of action, governed by established rules and applied for and issued under established forms. Upon application for this writ against a public

officer, the questions to be considered are: 1st. Is the duty claimed a ministerial duty? 2d. Has the petitioner a legal right, for the enjoyment, protection, or redress of which the discharge of said duty is necessary? 3d. Has he no other adequate and sufficient remedy? High, section 10. And these are the questions before us.

The petitioners ask that the chairman of the county commissioners of York county shall be required to endorse the certificate of the engineer, ... and that the clerk of the board shall attest his signature. Can the performance of these acts be ordered as ministerial duties? What is a ministerial duty on the part of a public officer? We think it may be defined briefly, yet fully, to be some duty imposed expressly by law, not by contract (High, section 25); or arising necessarily as an incident to the office, involving no discretion in its exercise, but mandatory and imperative. High, section 42. Now, is the duty claimed here by the petitioners at the hands of the respondents a duty of that character? There is certainly no act or law of force expressly imposing this duty upon them. Nor is it a duty necessarily arising as an incident to the offices which they hold. Nor was it contracted in furtherance of any legal duty attempted by them, and which cannot now be completed without the performance of this.

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This being so, we do not see how any ministerial duty, in the sense as defined above, could attach.

It is said, however, that the recent act, *supra*, has validated these bonds, and has legalized all the proceedings under which they were executed, and the conditions upon which they were to be delivered to the railroad, including the contract to have the certificate of the engineer endorsed by the chairman and attested by the clerk. We think this is a mistake. We do not understand that the act of 1888, *supra*, has had that effect; nor was such its intention, in so far as the proceedings of the different townships were concerned.

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. . . . . We think the act in question is constitutional and valid.

But conceding this, we do not see how it warrants the *mandamus* prayed for. There is certainly nothing in this act expressly commanding the respondents to perform the stipulations of the contract upon which this proceeding is based, nor is there any duty imposed thereby upon the respondents to which the suggested acts are neces-

sarily incidents, and therefore there is no ministerial duty in this regard attaching to them to be enforced by the writ prayed for.

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The petition must therefore be dismissed, and it is so adjudged and decreed.

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Mandamus may not be used to enforce the performance of a contract. State v. Turnpike Co., 16 Ohio St. 308.

II. Ministerial and Discretionary Duty.

STATE EX REL. BRICKMAN V. WILSON.

Supreme Court of Alabama. November, 1898.
123 Ala. 259.

McClellan, C. J. This is a petition by the State on the relation of Brickman for *mandamus* to issue to Massey Wilson, as Clerk of the House of Representatives, and to R. P. McDavid as Secretary of State.

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That the relator has such interest in having the integrity of the journal conserved in the manner prayed as authorizes him to exhibit this petition, and will entitle him to the relief he seeks if the duty of expurgation is upon the Secretary of State, we do not doubt. His attitude bears a striking similitude to that of relators who seek to coerce by *mandamus* the issuance to them of licenses to carry on certain occupations and businesses; and it is well settled in this court and generally that where the duty of issuing such licenses is ministerial, *mandamus* is the appropriate, indeed the only, remedy for its enforcement. This relator's interest in the premises is to carry on a business for which a license has all along been required upon the license which the law requires and which has been issued to him, without being subjected to additional license taxation in consequence of the failure of the Secretary of State to perform an alleged ministerial duty: he asks that that officer be ordered to perform that duty, to the end that he may carry on the business in which he is now engaged; and his interest and right is the same as if the duty upon that officer was to issue him a license, instead of being in effect to authorize him to continue to carry on the business without taking out or paying for an additional license.

Nor, again assuming the Secretary of State is under the alleged duty—has the relator any other remedy than by the writ of *mandamus* to enforce the performance of that duty. The "other remedy," the existence of which will oust—or rather prevent the invocation of—jurisdiction by *mandamus,* must be equally convenient, beneficial and effective as *mandamus. Raish* v. *Board of Education,* 81 Cal. 542; *Overseers* v. *Overseers,* 82 Pa. St. 275. It must be a remedy which will place the relator *in statu quo,* that is, in the same position he would have been had the duty been performed. *Etheridge* v. *Hall,* 7 Port. 47. Indeed, it must be more than this: it must be a remedy which itself enforces in some way the performance of the particular duty, and not merely a remedy which in the end saves the party to whom the duty is owed unharmed by its nonperformance. *Sessions & Leary* v. *Boykin,* 78 Ala. 328; 2 Spelling Extra Relief, § 1375; Merrill, Mandamus, § 53. Hence it is that while *mandamus* will not lie to enforce a duty which may be coerced by the ordinary civil actions at law, as where the duty is merely to pay money, or to deliver property—it does lie whenever such actions cannot be availed of to the specific performance of the official act which the relator is entitled to have performed—as where a disbursing officer refuses to draw a warrant it is his duty to draw, in which case an action for damages, while it would eventually save the relator harmless, would not coerce the discharge of the specific duty. And so it is here: This relator might defend against an indictment for carrying on his business without paying the additional license tax intended to be imposed by this alleged statute, or, paying it upon compulsion, he might recover back the amount so paid, upon showing the falsifications of the journal and, of consequence, the invalidity of the supposed enactment; but neither of these remedies would be as convenient, beneficial and effective as a proceeding by *mandamus,* neither would put him *in statu quo,* as that expression is employed in our decisions, and neither would compel the expurgation of the journal by the Secretary of State. It is plain, we think, that those assignments of demurrer which proceed upon the theory that the petition discloses another adequate remedy for the relator are not well taken.

There remains for consideration but one question. It is abstractly the most important in the case. It is also the most difficult. It is whether the Secretary of State was under a duty to erase and expunge the unauthorized entries from the house journal. That he was under such duty must be made to clearly appear before the writ of *mandamus* will lie against him in respect of it. If the duty exists

it is purely statutory: the Secretary of State has no duties to perform except those imposed upon him by the Constitution and statutes of the State. *Mandamus* is a conservative, not a creative remedy; it enforces existing duties but does not impose new duties. By it the officer may be coerced to an act which it was his duty to perform without it, but to no act as to which he was under no duty before its issuance. And the duty must be clear upon the statute. The rule as to the duty and the right as to its performance is variously and not always accurately expressed in the adjudged cases. The right must be "certain and positive." *Beaman* v. *Board,* &c., 42 Miss. 237. The duty must be "clear, and if there be doubt involving necessity for litigation," the writ will not lie. *Townes* v. *Nichols,* 73 Me. 515. There must be "a specific legal right, and a positive duty." *State ex rel.* v. *Burnside,* 33 S. C. 276. "Duty must be specifically enjoined by law." *Ferlorn* v. *Carriage Co.,* 42 Ohio St. 30. Right "must be clearly established. If right doubtful, writ will be refused." *M. & O. R. R.* v. *State,* 132 Ill. 559. "Writ will not issue where there is a substantial doubt of respondent's duty." *State ex rel.* v. *Buhler,* 90 Mo. 560. "Will not be awarded when there is a doubt of the relator's right to the relief sought." *State ex rel.* v. *Wallace,* 46 Ill. 415. "Duty must be clearly enjoined by law." *Draper* v. *Noteweare,* 7 Colo. 276. "It must be clearly commanded by law." *Pickett* v. *White,* 22 Tex. 559. "When the legal right is doubtful the writ will be denied." *State ex rel.* v. *Appleby,* 25 S. C. 100. Issued when there is a failure to perform "plain official duty" *Maddox* v. *Neal,* 45 Kan. 121, not "when well founded doubt as to the alleged duty arises." *State ex rel.* v. *Johnson,* 100 Ill. 537; *People* v. *Hatch,* 33 Ill. 9. "Where the validity of a judgment of conviction is doubtful, writ will not issue to enforce it." *Rex* v. *Broderif,* 5 B. & C. 239; *Regina* v. *Ray,* 44 Up. Can. Q. B. 17. The act sought to be compelled, must be "clearly defined and enjoined by law." *Glasscock* v. *Com'r.,* 3 Tex. 51. "The writ does not lie to compel a county judge to perform an act which the law does not specifically enjoin upon him, as a duty resulting from his office." *State ex rel.* v. *Napier,* 7 Ia. 425. The duty must be either imposed upon the officer "by some express enactment or necessarily result from the office he holds." *Pond* v. *Parrott,* 42 Conn. 13. Officer must be "expressly authorized by law." *Chisholm* v. *McGehee,* 41 Ala. 192. "A clear, specific legal right" to have the act performed must be shown. 3 Brick. Dig., p. 625.

As we have said, some of the foregoing expressions are inaccurate

or misleading. A doubt that may arise in the mind of the court in matter of law as to the existence of the duty will not, as some of the cases seem to hold, require or justify the denial of the writ: It is the court's province and duty to solve all such doubts and declare the duty as it finds it to be after its misgivings as to the intent and meaning of the statute involved or as to any other question of law have been eliminated. Substantial doubt as to whether the facts of the particular case present the conditions upon which the officer is bound to act, may, it would seem, justify or require a refusal of the writ. Of course the doubts of the officer as to his duty are of no consequence. *State* v. *Tarpen* (Ohio), 1 N. E. 209. Again, the duty need not be "specifically enjoined" or "expressly prescribed" by law. The true rule in this connection, we apprehend, is that the duty must be imposed in terms by the statute, in cases like the one in hand, or must result therefrom by fair and reasonable construction or interpretation: it must appear from the statute in terms or by fair implication. *Mobile & Ohio R. R. Co.* v. *Wisdom,* 5 Heisk. (Tenn.) 125; *Brown* v. *Duane,* 14 N. Y. S. 450; *State* v. *Balche,* 89 Mo. 188; *Pond* v. *Parrott,* 42 Conn. 13.

And the question recurs: Is the act which relator seeks through this proceeding to have performed by the Secretary of State imposed as an official duty upon him, expressly or by implication by statute? . . . . The legislature has not said that it shall be the duty of the Secretary of State to erase unauthorized matter interpolated into these records, but it has said only that he shall keep the records. Is the duty to erase a fair and just implication from the duty to keep? . . . .

Is any such duty to be gotten by implication from the language of the statute? We think not. Let the phrase "to keep" be given its broadest meaning, let it involve the duty to preserve, the duty to prevent spoliation, the duty to prevent interlineation, the duty to prevent entries of any and every kind upon the record as it comes to the Secretary of State, the duty to bring back the record when it is wrongfully taken from his office, the duty to replace leaves that have been torn from it if he can recover them, the duty to blot out ink that may be splotched upon the writing so as to render it illegible, let the duty by implication be extended to all these things, and yet it falls short of imposing upon the Secretary of State the duty of conferring on him the right to strike from this record any writing purporting to be part of it that may at any time appear upon it. For if he has the right and it is his duty to erase any one entry upon assurance more or less certain of its

falsity he has the same right and is under a like duty to expunge any other entry or any part of what appears to be the record upon like assurance of its falsity.

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And where there are the conflicting statements of two, he may rely upon the false statement and discredit the true one. And what would be the result? A solemn and true record would be destroyed beyond recovery or substitution, and the most important, formal and constitutional exercise of power by one of the great departments of government, resulting in statutes of the highest moment to the commonwealth, involving, it may be, the life, liberty and property of the citizen, would go for naught. This would not be "to keep the records of the general assembly," but to destroy them. And all this by the purely ministerial officer, who is charged with their preservation, acting *ex parte*, or rather upon his own motion, without power to examine witnesses, or even to receive affidavits, while the courts, whose business it must be to determine upon proper presentation, what does constitute the records of the general assembly, are not invoked and may be powerless to seasonably interfere to preserve those records from spoliation. It is no answer to say that in the case at bar the court is to determine whether there is an interpolation in the house journal and in what it consisted, and order its expurgation if it is found to be unauthorized. The court in this proceeding can only do that after determining that it was the Secretary of State's duty in the absence of all action by any court to have so determined and thereupon proceeded to erase the alleged foreign matter; and the courts cannot so adjudge in this instance without affirming for all time the power and duty of that officer to pass upon what these records contain and to expunge all that he finds in them that he thinks does not belong there. . . . .

The question presented is . . . . . whether . . . . . the Secretary of State was under a duty to expunge these entries. We say that he was not, because such duty would be so fraught with and productive of evil in the way of the spoliation and mutilation of the very record which the legislature has charged the Secretary of State to safely keep and preserve or, at the very best, to subject it to imminent risks of destruction, as that the law-makers could not have intended to have imposed it—could not, while expressly providing for preservation, have intended to afford opportunity and occasion for destruction—and an implication will not be allowed which is not only

not in line with the expressed intent but offers a means of defeating that intent. A duty which puts it in the power of a ministerial officer without adversary proceedings, without notice to anybody, without record of his acts and without his proceeding being subject to review, to change, amend, and destroy public records of the most vital importance to the State and to its citizens cannot be implied from the imposition upon him of the duty to safely keep and preserve those records: a power to thus destroy, even with the honest intent to preserve, cannot be implied from a duty to keep, guard and protect. And this is our conclusion, that from the statute which requires the Secretary of State to keep the house journal after it has been delivered into his custody by the clerk of the house, there is no implication of a duty or right in him to erase and expunge any entry that he may at any time find in that journal or upon the margin of the paper upon which it is written down, and that officer has no such right nor is he under any such duty.

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The record presents no error, and the judgment of the city court must be affirmed.

Affirmed.

See also People v. W. T., L. E. & W. R. R. Co., 104 N. Y. 58, *supra.* A civil suit for damages against an individual is not an adequate remedy nor is a suit on an official bond. People v. Green, 58 N. Y. 295, 306, *supra;* State v. Dougherty, 45 Mo. 294; but a suit for damages against a municipal corporation is an adequate remedy where damages are competent as a means of relief. King William J. J. v. Munday, 2 Leigh Va. 165. The remedy by indictment is not adequate. Fremont v. Crippen, 10 Cal. 211; People v. Moyer, 10 Wendell (N. Y.) 393.

EX PARTE HURN.

Supreme Court of Alabama. November, 1890.

92 Ala. 102.

Application by petition by W. P. Hurn, for a *mandamus* to the City Court of Montgomery, Hon. Thomas M. Arrington presiding, on the facts stated in the opinion.

COLEMAN, J. The petitioner, Hurn, having been arrested on the criminal charge of fraudulently obtaining goods on a credit, was searched by the officer making the arrest, who took from him

eleven hundred and twenty-four and 40-100 dollars, found concealed in his clothing. The prisoner and the money were delivered to the sheriff of the county. An attachment, having been sued out against the defendant Hurn, was placed in the hands of the sheriff, and by him levied upon the money in his possession. This was followed by a writ of garnishment executed by the coroner of the county upon the sheriff. The attachment and garnishment suits were made returnable to the City Court of Montgomery.

The sheriff, as garnishee, filed his answer setting up the facts and circumstances under which he came in possession of the money, paid the money into court, and prayed that "all proper issues and orders be made up under the direction of the court, in order that it might be ascertained to whom the money should be paid." The defendant Hurn moved the court for an order, that the money be restored to him, "upon the grounds that his person had been searched in violation of law, and the money wrongfully, illegally and violently taken from his person." The suit by attachment and upon which the garnishment issued were still pending and undisposed of at the hearing of the motion.

The court refused to permit moveant to introduce affidavits in support of the facts stated in his petition; and made the following order:

"April 14, 1891. Motion overruled.

1st. Because the court is without jurisdiction. 2d. Because the facts set out in the motion present an issue to be decided upon by the jury in the trial of the attachment suit."

From this order overruling the motion, the petitioner applies to this court for a *mandamus* "upon the grounds that the court refused to hear and determine the motion," etc.

In *Ex parte Redd*, 73 Ala. 549, it was declared that the coercive process of mandamus is proper when an inferior court refuses to proceed to judgment in a case in which the law makes it his duty to act. This court compels judgment, but will not control it.

In *Ex parte Schmidt and Smith*, 62 Ala. 254, it was held that the writ would lie to compel the execution of ministerial duties in all proper cases, but would not be awarded to order or direct what judgment shall be rendered in any given case, nor can its powers be invoked to correct any error in the final judgment or decree of an inferior court. In such cases there is an adequate remedy by appeal. *Ex parte Echols*, 39 Ala. 700; *Ex parte State Bar Association*, 8 So. Rep. 768.

In the case of petitioner, the court overruled the motion. The

motion has been disposed of by judicial action of the court. Whether the court erred in the order overruling the motion, or in not receiving in evidence the affidavits offered in support of the petition, or whether the reasons assigned by the court for overruling the motion are sufficient, cannot be reviewed on the application for the writ of *mandamus*. Such questions are revisable only by appeal. The remedy by appeal seems to have been resorted to in the cases cited by appellant.

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In any view we take of the case, the application for *mandamus* must be denied.

Mandamus denied.

The courts will, however, on mandamus, correct a clear abuse of discretion. Illinois State Board of Dental Examiners v. People, 123 Ill. 227, *supra*, and will force an authority to exercise its discretion one way or another. Commonwealth v. Court of Illinois, 2 Pickering (Mass.) 414.

III. Acts Impossible of Performance.

COUNTY COMMISSIONERS V. JACKSONVILLE.

Supreme Court of Florida. June, 1895.
36 Fla. 196.

This is a proceeding by *mandamus*, instituted by the city of Jacksonville against the County Commissioners of Duval county, to require them to turn over to the municipal authorities of said city one-half of the amount realized from a special tax for public roads and bridges levied and collected on the property within the corporate limits of said city, under section 17, chapter 4014, laws of 1891.

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Mabry, C. J.

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The only other contention demanding any discussion is, that the peremptory writ commands the county commissioners to forthwith turn over to the municipal authorities of Jacksonville $5,746.74, when, as shown by the return, only $758.91 remained in the treasury to the credit of the public road fund. The case was disposed of on the alternative writ and return thereto, and as shown by

the return, one-half of the amount collected and paid into the county treasury on property in the city of Jacksonville as a road fund for the year 1891, 1892 and 1893 was $8,455.79. The sum of $2,709.05, it is conceded, had been paid, and the balance amounted to $5,746.74. This last sum is the amount ordered by the court in the peremptory writ to be immediately turned over to the city authorities. The return distinctly alleges that the whole amount has been required and used for the purpose of keeping the county roads and bridges in good repair, except the sum of $758.91, the balance remaining in the hands of the county treasurer. According to the return of the county commissioners, it is clearly shown that the county had expended all the road and bridge fund except the amount stated, and that the only sum received by the city authorities was $2,746.05. The county had expended largely the city's part of the road money, but the money, as is clearly shown, is not in the county treasury to be turned over, and the question arises, to what extent will the remedy of *mandamus* apply? The writ of *mandamus* is a discretionary remedy, and while the courts will apply [it] in proper cases, they often refuse it when it would be attended by no beneficial results. *State ex rel.* v. *Commissioners of Marion Co.*, 27 Fla. 438, 8 So. Rep. 749. A peremptory writ of *mandamus* will not usually issue commanding an officer to do what is not within his power to do, and though by putting it out of his power to perform a duty he may become liable in damages, still where he cannot perform the act, and this is clear to the court, *mandamus* will not be issued against him. This rule has been applied to public officers who have improperly diverted funds in their hands or under their control so that they were unable to comply with some duty in reference to their disposal. *Rice* v. *Walker*, 44 Ia. 458; *Bates* v. *Porter*, 74 Cal. 224; *Universal Trustees* v. *Trustees of Columbia Township*, 6 Ohio 446, s. c. 27 Am. Dec. 267; *State ex rel. Board of Freeholders* v. *Township of Lacey*, 42 N. J. L. 536; *People ex rel.* v. *Tremain*, 29 Barb. 96; *State ex rel.* v. *City of New Orleans*, 34 La. Ann. 469; *Township Board of Education* v. *Boyd*, 58 Mo. 276. Under the showing made we think the court should not have undertaken to compel the county commissioners to turn over money that was not under their control, and which it was not in their power to do as officials of the county. The judgment should have commanded the county commissioners to turn over the road funds in the county treasury by issuing a warrant on the treasurer for that purpose. To this extent only should the remedy by *mandamus* be applied in this case.

The judgment is reversed with directions that the Circuit Court enter judgment in accordance with this opinion.

Mandamus will not lie to compel the performance of an unlawful act. People v. Assessors, 55 N. Y. 252, where the court refused to force assessors to verify an assessment in accordance with the law, where such action would have resulted in the commission of perjury. Nor will it lie to compel the doing of an act which has been forbidden by an injunction issued by a court of the same state. Ohio and Indiana R. R. Co. v. Commissioners, 7 Ohio St. 278; but the United States courts do not hesitate to force by mandamus the performance of an act forbidden by an injunction issued by a state court. Riggs v. Johnson Co., 6 Wall. 166.

WAMPLER V. STATE EX REL. ALEXANDER.

Supreme Court of Indiana. October, 1897.
148 Ind. 557.

JORDAN, J. This was a proceeding in the lower court on the part of the relators, Virgil H. Alexander, and Alexander Gable, to obtain a writ of mandate against the appellant, a township trustee of Blackford county, Indiana, to compel him to meet with them (who are also township trustees), for the purpose of electing a county superintendent of schools.

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The theory of the insistence of appellant's counsel is: 1st. That relators herein are not shown to have the requisite interest to entitle them to prosecute this action. 2d. That, under the facts, *mandamus* will not lie to compel the appellant to meet for the purpose of electing a superintendent on a day subsequent to the first Monday in June. Or, in other words, that he did not have the power, under the statute in controversy, of meeting, after the time provided therein, for the reason, as contended, that the law is mandatory in this respect, and restrains him from doing so; hence, on this ground, the principal contention is, that he cannot be mandated by the court to exercise a power which he did not possess after the first Monday in June, 1897, and consequently, there can be no meeting and election by the trustees until the next biennial year.

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Section 1182, Burn's R. S., 1894 (1168 R. S. 1881), being section 804 of the civil code, provides: "Writs of mandate may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust, or station." Under this provision of our code, the rule is well affirmed that *mandamus* is the proper remedy to coerce an official to discharge a public duty, and any person having an interest in the matter involved may apply for the writ. *Hamilton* v. *State*, 3 Ind. 452; *Holliday* v. *Henderson*, 67 Ind. 103.

Mandamus is regarded as an extraordinary remedy of an equitable nature, which will lie only where the law affords no other adequate remedy, and hence, without the aid of the writ, there would be a failure of justice.

The statute in express terms lodges the election of a county superintendent in the township trustees of each county, and imposes upon each of them the duty of meeting on the first Monday in June, beginning in 1873, and on the same day biennially thereafter, at the place designated, and of appointing a county superintendent. This being a duty enjoined upon these officials by law, therefore, in the event they refuse or neglect to discharge it, it then becomes one of the peculiar functions of a mandate to compel them to obey the law by discharging this duty, as there are no other adequate means to meet and remedy the evils and injustice which would result by reason of the failure or refusal of these public servants to respect and obey the law. Certainly, it cannot be successfully controverted but what *mandamus* may be invoked to enforce township trustees, or any one thereof to meet with each other at the time and place prescribed by law and proceed with the business of appointing a county superintendent. This being true, then if it can be said that they are not restrained or prohibited by the statute in question from meeting and performing this duty after the day prescribed, but still have the power to subsequently do so, there is no question but what, in the event of their failure or refusal to meet for the purpose mentioned, after the lapse of the time fixed by law, they may also be compelled to do so by a writ of mandate, on the application of any person shown to be invested with the right in the particular instance to demand it. *People* v. *Schiellen*, 95 N. Y. 124.

Having reached this conclusion, we may proceed to determine whether, in view of the facts in this cause, and the law applicable thereto, the appellant still had the legal power to meet for the pur-

pose provided by the statute, after the expiration of the time therein fixed, and was it his duty to exercise this power?

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While it is true that the statute in controversy does not in express terms provide for a meeting of the trustees on a day subsequent to the one named, neither does it expressly limit the power or right to meet on the day prescribed, and not thereafter. The duty of the trustees, under the statute, to elect a superintendent biennially, is imperative, and each of them is obliged to convene with the others on the first Monday in June of the proper year for that purpose. But there are no negative words in the statute, nor any feature or provisions therein to indicate that the legislature, under all circumstances, intended to limit their power to meet for the discharge of the duty assigned, to the day appointed, and thereby restrain or prohibit them from effectually executing it after the time appointed. . . . .

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Appellant's presence, under the circumstances, was essentially necessary, and, having the legal ability to be present, he refused to yield his obedience to the law and meet with relators, and thereby assist to carry out its object and purpose; and now, when confronted with the strong arm of the court compelling the performance of a willfully omitted duty, he seeks to shield himself from its performance under the claim, and upon the ground asserted, that he no longer possesses the power to do so. This claim, as we have seen, the law does not support. The authorities constrain us to hold that, under the facts, the obligation to perform this important public duty continued to rest on appellant after the expiration of the legally appointed day, and the law did not deprive him of the power to perform it thereafter, and *mandamus* is the proper action to remedy the wrong perpetrated by him. In addition to other authorities on this point, see Smith's Addison on Torts, p. 648.

Where the question involved in a *mandamus* proceeding is of a public concern, as is the one herein, and the object of the action is to enforce the performance of a public duty or right in which the people in general are interested, the applicant for the writ is not required to show any legal or special interest in the result sought to be obtained. It is only necessary that he be a citizen, and, as such, interested in common with other citizens in the execution of the law. High on Extraordinary Remedies, section 431; *Board, etc.*, v. *State*, 86 Ind. 8, and cases there cited. It follows,

therefore, that the relators are shown to have the requisite degree of interest to enable them to maintain this action. It is to be regretted that appellant, as a public official, entrusted, under the law, with a public duty, should disregard its plain provisions and commands. Such neglect or refusal to perform a duty which he had sworn to discharge, merits severe condemnation. When public officers, charged with the execution of the law, refuse to obey its mandates, or willfully ignore them, the evil results which must necessarily follow from such acts, tend to undermine the very foundation of civil government. When such officers fail or refuse to discharge their plain duties under the law, not only do they violate their official oaths, but also subject themselves to the penalty imposed by section 2105, Burn's R. S. 1894 (2018 R. S. 1881).

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Judgment affirmed.

Any taxpayer has sufficient interest to apply for mandamus to force the performance of duties affecting the public. People v. Hulsey, 37 N. Y. 346; State v. Common Council, 33 N. J. L. 110; Ottawa v. People, 48 Ill. 233; Union Pacific Ry. Co. v. Hall, 91 U. S. 343. But this is not the rule in Massachusetts, Wellington et al., Petitioners, 16 Pickering 87, and in some other states. In cases of merely private interest, private interest peculiar to the applicant must be shown. People v. Walker, 9 Mich 328. Officers of the government are also proper parties to mandamus proceedings to compel the performance of public duties by officers or public corporations. See Attorney Gen. v. Com. Council, 78 Mich., 545; Same v. Same, 53 Mich. 213; Same v. Same, 112 Mich. 145; State v. Crawford, 28 Fla. 441; Chicago &c R. R. Co. v. Minnesota, 134 U. S. 418; People v. N. Y., L. E. & W. R. R. Co., 104 N. Y. 58.

IV. Demand and Refusal.

STATE EX REL. GRINSFELDER V. RAILWAY CO.

Supreme Court of Washington. June, 1898.
19 Wash. 518.

Reavis, J. Application by relator for a writ of *mandamus* to compel the defendant, a street railway company, to operate a line of street railway to Bell Park addition to the city of Spokane.

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1. It is urged by the defendant, appellant here, that, no demand having been made upon it to resume the operation of its line, the action cannot be maintained. It is true that, upon the necessity of a previous demand and refusal to perform the act which it is sought to coerce by *mandamus* the authorities are not altogether reconcilable. Mr. High says:

"The better doctrine, however, seems to be that which recognizes a distinction between duties of a public nature, or those which affect the public at large, and duties of a merely private nature, affecting only the rights of individuals. And while in the latter class of cases, where the person aggrieved claims the immediate and personal benefit of the act or duty whose performance is sought, demand and refusal are held to be necessary as a condition precedent to relief by *mandamus*, in the former class, the duty being strictly of a public nature, not affecting individual interests, and there being no one specifically empowered to demand its performance, there is no necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal." High, Extraordinary Legal Remedies (2d ed.), § 13. See also, Id. § 41.

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In *Northern Pacific R. R. Co.* v. *Territory*, 3 Wash. T. 303 13 Pac. 604, it was said by the court:

"No demand for the facilities required was ever made upon the company. That a demand would be necessary as a foundation of proceedings of this nature to establish a mere private right, is conceded; but it is claimed by appellee that this was a question of public right and that the company was neglecting to perform a duty which it owed to the public, and that in such a case a demand was not necessary. We think this claim is established by the facts and law of this case."

It may be noted that appellant did not deny that it had discontinued the operation of its street railway line indefinitely. The rule which requires a demand to be made before application to the court for a writ of mandate is founded upon reason; that is, it is unjust that defendant should be subjected to the payment of costs for a failure of some duty which it was willing to perform, had it been requested to do so.

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The judgment of the superior court is affirmed.

ANDERS and DUNBAR, JJ., concur.

V. Effect of Change in Office.

MURPHY V. UTTER.

Supreme Court of the United States. October, 1901.
186 U. S. 95.

This was an appeal by the Loan Commissioners of Arizona from a judgment of the Supreme Court of that Territory rendered March 22, 1901, granting a peremptory writ of *mandamus* and commanding such Loan Commissioners, upon the tender by plaintiffs of $150,000 bonds of the county of Pima with coupons attached, described in the petition, to issue and deliver to the petitioners refunding bonds of the Territory pursuant to certain acts of Congress.

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Mr. Justice Brown delivered the opinion of the court.

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Of the numerous defenses on the merits set up in the amended return, but two are pressed upon our attention, namely, whether the petition abated by a change of the personnel of the Loan Commission, or by a repeal of the act abolishing the commission altogether.

1. The court was correct in holding that the change in the personnel of the commission did not abate the proceeding, which was not taken against the individuals as such, but in their official capacity as Loan Commissioners. The original petition was entitled and brought by Utter and Voorhies, plaintiffs, against "Benjamin J. Franklin, C. P. Leitch and C. M. Bruce, Loan Commissioners of the Territory of Arizona," and the prayer was for a writ of *mandamus* requiring the defendants, "acting as the Loan Commissioners of the Territory," to issue the refunding bonds.

The question when a suit against an individual in his official capacity abates by his retirement from office has been discussed in a number of cases in this court, and a distinction taken between applications for *mandamus* against the head of a department or a bureau for a personal delinquency, and those against a continuing municipal board in its corporate capacity. The earliest case is that of *The Secretary* v. *McGarrahan,* 9 Wall. 298, which was a writ of *mandamus* against Mr. Browning, then Secretary of the Interior, in which it appeared that Mr. Browning had resigned some months before the decision of the court was announced. It

was held that the suit abated by his resignation, because he no longer possessed the power to execute the commands of the writ, and that his successor could not be adjudged in default, as the judgment was rendered against him without notice or opportunity to be heard. The same question was more fully considered in *United States* v. *Boutwell,* 17 Wall. 604, in which it was held that a *mandamus* against the Secretary of the Treasury abated on his death or retirement from office, and that his successor could not be brought in by way of amendment or order of substitution.

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It was doubtless to meet the difficulties occasioned by these decisions that Congress on February 8, 1899, passed an act, 30 Stat. 822, to prevent the abatement of such actions.

We have held, however, in a number of cases, that if the action be brought against a continuing municipal board it does not abate by a change of personnel. Thus, in *Commissioners* v. *Sellew,* 99 U. S. 624, which was an application for a *mandamus* against a board of county commissioners and its individual members to compel them to levy a tax to pay a judgment, it was held that the action would lie, though the terms of the members had expired, and the case of *Boutwell* was distinguished upon the ground that the county commissioners were "a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone." Said the Chief Justice: "One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifests itself in *Boutwell's* case may be avoided. In this way the office can be reached and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The board is in effect the officer, and the members of the board are but the agents to perform such duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failing to do what the law requires of them as representatives of the corporation."

This was followed by *Thompson* v. *United States,* 103 U. S. 480, which was a petition for a *mandamus* to compel the clerk of a township to certify a judgment obtained by the relator against the township, to the supervisor, in order that the amount thereof might

be placed upon the tax roll. It was held that the proceeding did not abate by the resignation of the clerk upon the appointment of his successor; citing *People* v. *Champion,* 16 John. 60, and *People* v. *Collins,* 19 Wend. 56. See also *In re Hollon Parker,* 131 U. S. 221.

We think these cases control the one under consideration and that they are clearly distinguishable from the others. The Loan Commission of Arizona was originally created by an act of the territorial legislature of 1887, Laws of 1887, chap. 31.

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Congress, by an act approved June 25, 1890, re-enacted this statute substantially *verbatim,* 26 Stat. 175. As the members of this commission and their successors in office were constituted a Loan Commission for the express purpose of liquidating and providing for the payment of the outstanding indebtedness of the Territory, and subsequently by the act of Congress of 1896, 29 Stat. 262, of its counties, municipalities and school districts, we think it must be treated as a continuing body, without regard to its individual membership, and that the individuals constituting the board at the time the peremptory writ was issued may be compelled to obey it. As we said, in *Thompson's Case,* 103 U. S. 480, "the proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment."

It is true the Loan Commissioners were not made a corporation by the act constituting the board, but they were vested with power, and were required to perform a public duty; and, in case of refusal, the performance of such duty may be enforced by *mandamus,* under section 2335 of the Revised Statutes of Arizona of 1887, which provides that "the writ of *mandamus* may be issued by the Supreme or District Court to any inferior tribunal, corporation, *board* or person, to compel the performance of an act which the law especially enjoins." As, under the act of Congress, as well as the territorial act, the board was made a continuing body with corporate succession, the fact that it is not made a corporation by name is immaterial.

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Upon the whole case we are of opinion that the judgment of the Supreme Court of Arizona, ordering a peremptory *mandamus* to issue to the present Loan Commissioners, was right, and it is therefore *Affirmed.*

Mr. Justice GRAY did not sit in this case and took no part in its decision.

VI. Courts Having Jurisdiction.

'AMOS KENDALL, POSTMASTER-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR, V. THE UNITED STATES, ON THE RELATION OF WILLIAM B. STOKES ET AL.

Supreme Court of the United States. 1838.

12 Peters 524.

Mr. Justice Thompson delivered the opinion of the court.

This case comes up on a writ of error from the circuit court of the United States for the District of Columbia, sitting for the county of Washington.

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The questions arising upon this case, may be considered under two general inquiries:

1. Does the record present a proper case for a mandamus and if so, then,

2. Had the circuit court of this district jurisdiction of the case, and authority to issue the writ?

Under the first head of inquiry, it has been considered by the counsel on the part of the postmaster-general, that this is a proceeding against him to enforce the performance of an official duty. And the proceeding has been treated as an infringement upon the executive department of the government, which has led to a very extended range of argument on the independence and duties of that department; but which, according to the view taken by the court of the case, is entirely misapplied. We do not think the proceedings in this case interfere, in any respect whatever, with the rights or duties of the executive or that it involves any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the postmaster-general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control.

We shall not, therefore, enter into any particular examination of the line to be drawn between the powers of the executive and judicial departments of the government. The theory of the consti-

tution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond that, all are subject to regulations by law, touching the discharge of the duties required to be performed.

The executive power is vested in a president; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.

Let us proceed, then, to an examination of the act required by the mandamus to be performed by the postmaster-general; and his obligation to perform, or his right to resist the performance, must depend upon the act of Congress of the 2d of July, 1836. This is a special act for the relief of the relators, Stockton & Stokes; and was passed as appears on its face, to adjust and settle certain claims which they had for extra services, as contractors for carrying the mail. These claims were, of course, on the United States, through the postmaster-general. The real parties to the dispute were, therefore, the relators and the United States. The United States could not, of course, be sued, or the claims in any way enforced against the United States, without their consent obtained through an act of Congress: by which they consented to submit these claims to the solicitor of the treasury to inquire into and determine the equity of the claims, and to make such an allowance therefor as upon a full examination of all the evidence, should seem right, according to the principles of equity. And the act directs the postmaster-general to credit the relators with whatever sum, if any, the solicitor

shall decide to be due to them, for or on account of any such service or contract.

The solicitor did examine and decide that there was due to the relators, one hundred and sixty-one thousand five hundred and sixty-three dollars and ninety-three cents; of this sum the postmaster-general credited them with one hundred and twenty-two thousand one hundred and one dollars and forty-six cents; leaving due the sum of thirty-nine thousand four hundred and seventy-two dollars and forty-seven cents, which he refused to carry to their credit. And the object of the *mandamus* was to compel him to give credit for this balance.

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It was urged at the bar, that the postmaster-general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power to entirely control the legislation of Congress, and paralyze the administration of justice.

To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible. But although the argument necessarily leads to such a result, we do not perceive from the case that any such power has been claimed by the President. But, on the contrary, it is fairly to be inferred that such power was disclaimed.

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The act required by the laws to be done by the postmaster-general is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial; and about which the postmaster-general had no discretion whatever.

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There is no room for the exercise of any discretion, official or otherwise: all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act.

And in this view of the case, the question arises, is the remedy by mandamus the fit and appropriate remedy?

The common law, as it was in force in Maryland when the cession was made, remained in force in this district. We must, therefore, consider this writ as it was understood at the common law with respect to its object and purpose, and varying only in the form required by the different character of our government. It is a writ, in England, issuing out of the king's bench, in the name of the king, and is called a prerogative writ, but considered a writ of right; and is directed to some person, corporation or inferior court, requiring them to do some particular thing, therein specified, which appertains to their office or duty, and which is supposed to be consonant to right and justice, and where there is no other adequate specific remedy. Such a writ, and for such a purpose, would seem to be peculiarly appropriate to the present case. The right claimed is just and established by positive law; and the duty required to be performed is clear and specific, and there is no other adequate remedy.

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That the proceeding on a mandamus is a case within the meaning of the act of Congress, has been too often recognized in this court to require any particular notice. It is an action or suit brought in a court of justice, asserting a right; and is prosecuted according to the forms of judicial proceedings.

The next inquiry is whether the court below had jurisdiction of the case, and power to issue the mandamus?

This objection rests upon the decision of this court, in the cases of *M'Intire* v. *Wood*, 7 Cranch 504; and *M'Cluny* v. *Silliman*, 6 Wheat. 369. It is admitted that those cases have decided that the circuit courts of the United States, in the several states, have not authority to issue a mandamus against an officer of the United States. And unless the circuit court in the District of Columbia has larger powers in this respect, it had not authority to issue a mandamus in the present case.*

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But let us examine the act of congress of the 27th of February, 1801, concerning the District of Columbia, and by which the circuit court is organized, and its powers and jurisdiction pointed out.

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* See Bates & Guild Co. v. Payne, 194 U. S. 107, *supra*, for an instance of the use of a mandatory injunction to compel action by an officer of the United States government.

The first section declares that the laws of the state of Maryland, as they now exist, shall be, and continue in force in that part of the district which was ceded by that state to the United States; which is the part lying on this side of the Potomac, where the court was sitting when the mandamus was issued. It was admitted on the argument that at the date of this act, the common law of England was in force in Maryland, and of course it remained and continued in force in this part of the district; and that the power to issue a mandamus in a proper case is a branch of the common law, cannot be doubted.

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The theory of the British government, and of the common law is, that the writ of mandamus is a prerogative writ, and is sometimes called one of the flowers of the crown, and is therefore confided only to the king's bench; where the king, at one period of the judicial history of that country, is said to have sat in person, and is presumed still to sit. And the power to issue this writ is given to the king's bench only, as having the general supervising power over all inferior jurisdictions and officers, and is coextensive with judicial sovereignty. And the same theory prevails in our state governments, where the common law is adopted, and governs in the administration of justice; and the power of issuing this writ is generally confided to the highest court of original jurisdiction.

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There can be no doubt, but that in the state of Maryland a writ of mandamus might be issued to an executive officer, commanding him to perform a ministerial act required of him by law; and if it would lie in that state, there can be no good reason why it should not lie in this district, in analogous cases.

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Under the judiciary act, the power to issue this writ, and the purposes for which it may be issued in the courts of the United States, other than in this district, is given by the fourteenth section of the act, under the general delegation of power "to issue all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." And it is under this power, that this court issues the writ to the circuit courts, to compel them to porceed to a final judgment or decree in a cause, in order that we may exercise the jurisdiction of review given by the law; and the same power is exercised by the circuit courts over the district courts, where a writ of error or appeal lies to the cir-

cuit court. But this power is not exercised, as in England, by the king's bench, as having a general supervising power over inferior courts; but only for the purpose of bringing the case to a final judgment or decree, so that it may be reviewed. The mandamus does not direct the inferior court how to proceed, but only that it must proceed, according to its own judgment, to a final determination; otherwise it cannot be reviewed in the appellate court. So that it is in a special, modified manner, in which the writ of mandamus is to be used in this court, and in the circuit courts in the states; and does not stand on the same footing, as in this district under the general adoption of the laws of Maryland, which included the common law as altered or modified on the 27th of February, 1801.

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The judgment of the court below is accordingly affirmed with costs, and the cause remanded for further proceedings.

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State Courts may not issue the writ to officers of the United States government. McCluny v. Silliman, 6 Wheat 598.

The issue of mandamus lies in the discretion of the court, which will not issue it if the relator has been negligent. People v. Common Council, 78 N. Y. 56, nor to force a technical compliance with the law which will be in violation of its spirit. State v. Commissioners, 26 Kan. 419.

The writ of mandamus has never been issued to the President, and by the better rule it will not issue to the governor of a state. State v. Drew, 17 Fla. 67; People v. Morton, 156 N. Y. 136; *contra*, State v. Chase, 5 Ohio St. 528; People v. Bissell, 19 Ill. 229.

Other instances of the use of the write of mandamus treated in this collection are: Lewis v. Commissioners, 16 Kan. 102; Maynard v. Board, 34 Mich. 228; counting of votes: Stephenson v. Boards, 118 Mich. 396; placing of same on official ballot; People v. Mosher, 163 N. Y. 32; to appoint to office; Exparte Hennen, 13 Peters 230; to reinstate in office; Marbury v. Madison, 1 Cranch (U. S.) 137; to deliver commission; State v. Crawford, 28 Fla. 441; to countersign a commission; Speed v. Detroit, 97 Mich. 198; approval of official bond; Brown v. Turner, 70 N. C. 93, and State v. McAllister, 38 W. Va. 485; to force recognition as officer: Brown v. Russell, 166 Mass. 14; to put on eligible list: People v. Weber, 89 Ill. 347, and Hanna v. Loring, 84 Md. 179; to obtain possession of paraphernalia of office; Atty. Gen. v. Common Council, 58 Mich. 213; to obtain consideration of nominations to office: Atty. Gen. v. Common Council, 78 Mich. 545; to secure provision for the registration of voters: People v. Democratic Committee, 164 N. Y. 335; to reinstate in party office: State v. Supervisors, 21 Ohio 282; Fisk v. Jefferson Police Jury, 116 U. S. 131; Supervisors v. United States, 4 Wall. 435; the levy of a tax: Mullnix v. Mutual Life Ins. Co., 23 Col. 71; Harvey v. Philbrick, 40 N. J. L. 374; People v. Green, 58 N. Y. 295; People v. Palmer, 52 N. Y. 83; to pay an account

or warrant: People v. Com. Council, 112 Mich. 145; People v. Palmer, 154 N. Y. 153; to hold an election: Illinois State Board of Dental Examiners v. People, 123 Ill. 227, and Grider v. Tally, 77 Ala. 422; to grant a license: People v. N. Y., L. E. & W. R. R. Co., 104 N. Y. 58 and Chicago &c R. R. Co. v. Minnesota, 134 U. S. 418; obedience to administrative order: Badger v. United States, 93 U. S. 599; State v. Ferguson, 31 N. J. L. 107; to force officers to act who claim to have resigned: Commonwealth v. Walton, 182 Pa. St. 373; Pennie v. Reis, 132 U. S. 464; In re Mahon, 171 N. Y. 263; payment of a pension. See also United States v. Deuell, 172 U. S. 576; issue of a patent: Fox v. McDonald, 101 Ala. 51; administration of official oath: United States v. Black, 128 U. S. 40; to obey order of supervisor: Blue v. Beach, 155 Ind. 121; admission of child to school: County Commissioners of Talbot County v. County Commissioners of Queen Anne's County, 50 Md. 245; levy of tax: Mount Hope Cemetery v. Boston, 158 Mass. 509; transfer of property.

An instance of the action for the delivery of books and papers which resembles somewhat a mandamus is In re Guden, 171 N. Y. 529, *supra*.

CHAPTER XI.

THE PROHIBITION.

I. Power Subject to the Writ.

THE PEOPLE EX REL. ONDERDONK V. SUPERVISORS.

Supreme Court of New York. January, 1841.
1 Hill 195.

H. M. Western moved for a *certiorari, prohibition, mandamus,* "or *some other writ, instrument, process, order or proceedings,*" for the relief of the relator and other taxable inhabitants of the town of North Hempstead, Queens county, from the tax which the town collector was proceeding to collect by virtue of a warrant from the board of supervisors of the county.

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Bronson, J.

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The only remaining branch of this case is the motion of the relator for a writ of *prohibition* to the *town collector* to stay the levying of the tax. A writ of *prohibition* does not lie to a *ministerial officer* to stay the execution of process in his hands. It is directed to a *court* in which some action or legal proceeding is pending, and to the *party* who prosecutes the suit, and commands the one not to hold, and the other not to follow the plea. It stays both the court and the party from proceeding with the suit. The writ was framed for the purpose of keeping inferior courts within the limits of their own jurisdiction, without encroaching upon other tribunals. 2 Inst. 601; Vin. Ab. tit. Prohibition; and same title in Com. Dig., Bac. Ab. 7th Lon. ed., and Tomlin's Law Dict.; 3 Bl. Com. 111; see also Tomlin's Law Dict. tit. Consultation; and F. N. B. 116. Our statute also shows that the writ issues to a *court* and prosecuting *party*—not to a ministerial officer. 2 R. S. 587, §§ 61, 65. In the *People* v. *Works*, 7 Wend. 486, although the motion for a prohibition *seems* to have been granted, the remarks of the chief justice are in perfect harmony with what has been said in this opinion in relation to the proper office of the writ; and that case must not be understood as having decided anything more than that the tax then

under consideration was illegal. There is not the slightest foundation in the books for saying, that a prohibition may issue to a ministerial officer to stay the execution of process in his hands.

If the relator has suffered, or is in danger of suffering an injury, he is mistaken in supposing that we can grant the relief which he asks.

Motion denied.

SPEED V. COMMON COUNCIL OF THE CITY OF DETROIT.

Supreme Court of Michigan. January, 1894.
98 Mich. 360.

Motion by respondents to vacate order for writ of prohibition against the procedure of the common council in the investigation of charges preferred by the mayor against the city counselor of Detroit. Argued December 12, 1893. Denied January 5, 1894. The facts are stated in the opinion and in 97 Mich. 198.

GRANT, J.

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The principal question in this case is the power of the council to remove the city counselor for cause, but two preliminary matters will be first determined.

1. It is suggested, rather than seriously insisted, by the learned counsel for the respondents, that the writ of prohibition does not lie in the present case, for the reason that the common council was proceeding in a political or administrative way, rather than in any other. They cite Mechem Pub. Off. §§ 1019, 1020; High, Extra. Rem. §§ 769, 783; *Burch* v. *Hardwicke*, 23 Grat. 51; *People* v. *District Court*, 6 Colo. 534; *Smith* v. *Whitney*, 116 U. S. 167. The rule laid down by these learned authors is that the writ lies only to prevent the unauthorized exercise by courts and officers of judicial powers, and does not lie to restrain executive or ministerial action; and the above authorities, together with others, are cited in support of the proposition.

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The writ lies "to prohibit the exercise by an inferior tribunal or officer of judicial powers, with which he is not legally vested," and "to prevent actions in excess of jurisdictions conferred by law, and not to regulate or control the manner in which a lawful jurisdiction

shall be exercised." Mechem, Pub. Of. §§ 1013, 1014. Under the constitution the legislature may provide for the removal of municipal officers. It certainly has never been regarded in this state that the officer or body upon whom this power is conferred acts in a purely political, administrative, or legislative capacity. Such officer or body acts, and must of necessity act, in a *quasi* judicial capacity, and the method of procedure must be of a *quasi* judicial character. *Stockwell* v. *Township Board,* 22 Mich. 341; *Dullam* v. *Wilson,* 53 Id. 392; *Clay* v. *Stuart,* 74 Id. 411; *Fuller* v. *Attorney General,* 98 Id. 96. Such officer or body then becomes an inferior tribunal, amenable to the writ of prohibition when acting in excess of the jurisdiction conferred. In such cases it is of little consequence what name is given to the power conferred. The name cannot relieve it of its essential character. It would be a reproach to the law if it did not provide a speedy remedy by which such tribunals can be prohibited from the exercise of an excess of authority, or of an authority which they do not possess. We are of the opinion that the writ lies in the present case. *State* v. *Common Council,* (Minn.) 55 N. W. 118; *People* v. *Cooper,* 57 How. Pr. 416; 1 Dillon Mun. Corp. § 191 (4th ed. § 253.)

2. While it appeared, upon the argument, to be conceded that the sufficiency of the charges is not here in issue, still, we deem it proper to say that the charges preferred, so far as they relate to the acts of Mr. Speed committed before his appointment to and induction into this office, are clearly beyond the jurisdiction of the respondents to determine.

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3. It was settled in *Speed* v. *Common Council, supra,* that the mayor could not revoke the appointment when once made, and that neither he nor the common council possessed the power to remove at will. That case was ably argued and received the most careful examination by this court. We see no occasion to change our views, or to question the soundness of the conclusions then reached.

Counsel for respondents, in their brief upon the application for a rehearing in that case, concede that "there is no provision whatever for the removal of an appointive officer upon charges nor for the trial of such charges;" but they contend (1) that the power of removal is necessarily implied from the language used in the act of 1893; and (2) that the power of removal for cause is implied from the character and from the nature of the municipal organization.

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No support for the positions of respondents can, we think, be found in the charter itself. The subject of removals is completely covered by its provisions, and it excludes removals in any other manner than is there provided. Elective officers, with few exceptions, can be removed for cause. This, under the well established rule, excludes the power to remove at will. Certain appointive officers, under the charter, can be removed at will, without charges or trial. Charter, chap. 4, § 19. This likewise excludes the power to remove for cause. Where the power to remove at will is given, the law does not contemplate that the officer may be put to the expense of a trial for cause, and have charges of official misconduct placed before the public.

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It is also significant that the act gives the common council no voice, either in the appointment or confirmation of the city counselor. The absolute authority and the entire responsibility of his appointment, are given to the mayor, without power of removal at will or for cause. There is nothing in the act which shows any intention on the part of the legislature to confer such power upon the common council; nor do we think such power is inherent in the council, which is the governing body of the municipal corporation, and derives its powers from express legislative enactments.

The motion to vacate the order must therefore be denied, with costs.

The other justices concurred.

Prohibition will not issue to the governor of a state. Grier v. Taylor, 4 McCord (Tenn.) 206.

II. Is a Preventive Remedy.

UNITED STATES V. HOFFMAN.

Supreme Court of the United States. December, 1866.
4 Wall. 158.

On a motion for prohibition.

At the last term of this court the relator made application for a writ of prohibition to the judge of the District Court of the Northern District of California, to prevent that court from proceeding further in a certain cause in admiralty.

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Mr. Justice Miller delivered the opinion of the court.

The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect of a writ of prohibition is to suspend all action, and to prevent any further proceeding in the prohibited direction. In the case before us, the writ, from its very nature, could do no more than forbid the judge of the District Court from proceeding any further in the case in admiralty.

The return shows that such an order is unnecessary, and will be wholly useless, for the case is not now pending before that court, and there is no reason to suppose that it will be in any manner revived or brought up again for action. The facts shown by the return negative such a presumption.

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The suggestion that there are or may be other cases against the relator of the same character can have no legal force in this case. If they are now pending, and the relator will satisfy the court that they are proper cases for the exercise of the court's authority, it would probably issue writs instead of a rule, but a writ in this case could not restrain the judge in the other cases by its own force, and could affect his action only so far as he might respect the principle on which the court acted in this case. We are not prepared to adopt the rule that we will issue a writ in a case where its issue is not justified, for the sole purpose of establishing a principle to govern other cases.

We have examined carefully all the cases referred to by counsel which show that a prohibition may issue after sentence or judgment; but in all these cases something remained which the court or party to whom the writ was directed might do, and probably would have done, as the collection of costs, or otherwise enforcing the sentence.

Here the return shows that nothing is left to be done in the case. It is altogether gone out of the court.

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The rule heretofore granted in this case is *Discharged.*

The United States Supreme Court may issue the writ only to the district courts in admiralty cases, ex parte Christy, 3 How. 292. Circuit courts may issue it only to aid an already acquired jurisdiction. In re Binninger, 7 Blatchford 159. No court with mere appellate jurisdiction may issue it. Memphis v. Halsey, 12 Heiskell, 210.

III. Corrects Only Excess of Jurisdiction.

APPO V. THE PEOPLE.

Court of Appeals of New York. March, 1860.
20 N. Y. 531.

. . . . . .

Selden, J. The first question to be considered is, whether the writ of prohibition was a proper remedy, assuming that the court of Oyer and Terminer had no authority to grant a new trial upon the merits after conviction and sentence for the crime of murder.

The office of this writ is to restrain subordinate courts and inferior judicial tribunals of every kind from exceeding their jurisdiction. It is an ancient and valuable writ, and one the use of which in all proper cases should be upheld and encouraged, as it is important to the due and regular administration of justice that each tribunal should confine itself to the exercise of those powers with which, under the constitution and laws of the state, it has been entrusted.

But it is said, that when an inferior court or tribunal has jurisdiction of the action, or of the subject matter before it, any error in the exercise of that jurisdiction can neither be corrected nor prevented by a writ of prohibition.

It is true that the most frequent occasions for the use of the writ are where a subordinate tribunal assumes to entertain some cause or proceeding over which it has no control. But the necessity for the writ is the same where, in a matter of which such tribunal has jurisdiction, it goes beyond its legitimate powers; and the authorities show that the writ is equally applicable to such a case. Mr. Jacob, in treating of this writ, after saying that it may issue to inferior courts of every description, whether ecclesiastical, temporal, military or maritime, whenever they attempt to take cognizance of causes over which they have no jurisdiction, adds: "or if, in handling of matters clearly within their cognizance, they *transgress the bounds* prescribed to them by the laws of England, as where they require two witnesses to prove the payment of a legacy." Jac. Law. Dict., title Prohibition.

. . . . . .

These cases prove that the writ lies to prevent the exercise of any unauthorized power, in a cause or proceeding of which the subordinate tribunal has jurisdiction, no less than when the entire

cause is without its jurisdiction. The broad remedial nature of this writ is shown by a brief statement of a case by Fitzherbert. In stating the various cases in which the writ will lie, he says: "And if a man be sued in the Spiritual Court, and the judges there will not grant unto the defendant the copy of the libel, then he shall have a prohibition directed unto them for a surcease," etc., until they have delivered the copy of the libel, according to the statute made Anno 2 H., 5 (F. N. B., title Prohibition.)

This shows that the writ was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of this remedy ought not, I think, to be abridged, as it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed. I have no hesitation, therefore, in holding that this was a proper case for the use of the writ, if the Supreme Court was right in the conclusion to which it arrived at general term.

. . . . . .

The judgment should, I think, be affirmed.

Prohibition may not be used to correct mere errors of law not involving an excess of jurisdiction. Buskirk v. Judge, 7 W. Va. 91; Murphy v. Sup. Court, 58 Cal. 520.

IV. Discretion of Court.

PEOPLE EX REL. ADAMS V. WESTBROOK.

Court of Appeals of New York. May, 1882.
89 N. Y. 152.

Rapallo, J. The relator has certain equitable claims against the estate of Peter G. Fox, deceased, upon which he brought an action against Fox in his life-time in the Supreme Court. A decision was rendered in that action in favor of the relator, and judgment was entered on such decision, but the judgment was set aside on the ground that Fox had died before the findings and the conclusions of the trial judge were signed, and the action was ordered to proceed as if no decision or findings had been signed. The relator, therefore, stands as plaintiff in an equitable action pending in the Supreme Court against Peter G. Fox, now deceased.

The surrogate of Montgomery county has ordered the real estate of Fox to be sold for the payment of his debts. The sale has been made, and the proceeds are in the hands of the surrogate for distribution.

The surrogate has ordered the usual order requiring all persons having claims or demands against the estate of the deceased to exhibit and prove the same before him, and for distribution of the fund among the creditors.

The relator filed with the surrogate, papers showing that he had the equitable claim before mentioned, and that an action therefor was pending in the Supreme Court, and he insisted to the surrogate, and now claims, that the surrogate had no jurisdiction to compel him to submit his equitable claims to adjudication in the surrogate's court, and that they, being the subject of an action pending in the Supreme Court, could not be withdrawn from the jurisdiction of that court, and that the surrogate should be restrained from adjudicating upon his claim and from distributing the fund, until the relator's claim shall have been adjudicated upon in his action pending in the Supreme Court. He also claims that the proceeds of the sale of the real estate of Fox are impressed with a trust for the payment of the judgments before mentioned, in preference to the claims of other creditors.

For the purpose of enforcing these positions he instituted the present proceeding. He obtained an alternative writ of prohibition, directed to the surrogate and to the executor, prohibiting them from proceeding in the matter of proving, examining, deciding upon or intermeddling with the claims of the relator so pending and awaiting adjudication in the Supreme Court. . . . . .

The alternative writ was granted upon affidavits in support of the allegations of the relator, and showing that the fund in the hands of the surrogate was insufficient to pay all the claims against the estate, including those of the relator. The respondents having made their return to the alternative writ, the application for a peremptory writ was heard at Special Term on the alternative writ and return, and an order was made denying the application. That order was affirmed at General Term and the relator appeals to this court.

We do not deem it proper to pass now upon the claims to equitable relief set up by the relator and argued in the elaborate points which he has submitted, nor upon the question of the jurisdiction of the surrogate in the matter, for the reason that we are of opinion that the decision of the Supreme Court denying the writ of prohi-

bition is not reviewable in this court. The writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity, or by appeal, and it is not remandable as a matter of right but of sound judicial discretion, to be granted or withheld, according to the circumstances of each particular case.

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It being discretionary with the Supreme Court whether to grant or deny the writ, its order refusing to grant it is not appealable to this court.

The appeal must be dismissed, with costs against the relator.

Appeal dismissed.

All concur, except MILLER and TRACY, JJ., absent.

A judgment awarding a prohibition is, however, appealable, since it deprives the individual of the right to sue. Appo. v. People, 20 N. Y. 531, *supra.*

CHAPTER XII.

THE INJUNCTION.

I. An Equitable not a Legal Remedy.

DOWS V. CITY OF CHICAGO.

Supreme Court of the United States. December, 1870.
11 Wall. 108.

Appeals from decrees of the Circuit Court of the United States for the Northern District of Illinois in two suits; one original, the other a cross suit.

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A demurrer was interposed to the bills, original and cross. The Circuit Court sustained the demurrers to both, and the complainants in the two cases electing to abide by their bills, the court entered decrees dismissing the bills. From these decrees appeals were taken.

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Mr. Justice Field delivered the opinion of the court.

According to the view we take of this case, it is unnecessary to consider the force of any of the objections urged by the appellants to the decrees rendered. Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived.

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. . . . . Our attention has not been called to any well considered case where a court of equity has interfered by injunction after its jurisdiction was questioned, except upon some one of the special circumstances mentioned.

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The Supreme Court of Illinois is equally clear upon this question. In the case of *Cook County* v. *The Chicago, Burlington and Quincy Railroad Company* (35 Ill. 465), the subject was considered, and the court said that it had been unable to find any decision, in its previous adjudications, asserting a right to bring a bill to restrain the collection of a tax illegally assessed, without regard to special circumstances. It concludes an examination of its former decisions by stating, that while it was considered settled that a court of equity would never entertain a bill to restrain the collection of a tax, except in cases where the tax was unauthorized by law, or where it was assessed upon property not subject to taxation, it had never held that jurisdiction would be taken in these excepted cases without special circumstances, showing that the collection of taxes would be likely to produce irreparable injury, or cause a multiplicity of suits.

Upon principle this must be the case. The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law. And except where the special circumstances which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or

the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action.

We see no ground for the interposition of a court of equity which would not equally justify such interference in any case of threatened invasion or real or personal property.

The cross-bill filed by the bank presents different features. That institution insists that if it paid the tax levied upon the shares of all its numerous stockholders out of the dividends upon their shares in its hands, which it is required to do by the law of the State, or if the shares were sold, it would be subjected to a multiplicity of suits by the shareholders, and were it an original bill the jurisdiction of the court might be sustained on that ground. But as a cross-bill it must follow the fate of the original bill.

Decree affirmed in both suits.

SAGE AND OTHERS, RESPONDENTS, V. THE TOWN OF FIFIELD AND OTHERS, APPELLANTS.

Supreme Court of Wisconsin. January, 1887.
68 Wis. 546.

TAYLOR, J. The appellants insist that the circuit court erred in refusing to dissolve the temporary injunction—(1) because the complaint does not state facts which, if admitted to be true, would justify the court in granting the relief prayed for in the complaint, even if it were admitted that the electors of said town had no authority to vote a road tax upon the taxable property of said town exceeding the sum of $2,000.

. . . . . .

Under the law requiring the highway taxes to be collected in money as other taxes are collected, it seems to us very clear that the duty of the supervisors as to making out warrants for the collection of such taxes is clearly abrogated; and if any duty remains on them as a board in fixing the amount of taxes to be raised for that purpose in the town, it is simply their duty, in the absence of any vote of the electors on the subject, to declare the number of

mills which shall be assessed on the valuation of the property of said town, and then the amount is to be carried out by the clerk upon the general assessment roll, and collected with the other taxes. In the case at bar the electors have indicated that all the highway taxes in said town for the year shall be $5,000. That sum the electors had the power to vote, with or without the approval of the board of supervisors, as the law gives the electors the right to direct the supervisors to raise fifteen mills on the dollar valuation, provided such fifteen mills does not exceed the sum of $2,000 and seven mills on such valuation. In this case the $5,000 does not exceed such sum; and if it be technically necessary that the board should, after the vote of the electors, direct so many mills on the valuation to be raised as would make the sum of the $5,000 voted by the electors, they could do that by directing that amount to be apportioned upon the assessment roll; and, according to their answer, that was all that was intended to be done in this case.

There is no equity, therefore, in staying the officers of the town in collecting a tax which the law clearly authorizes, even though some of the formalities of the law may not have been complied with.

. . . . .

By the Court.—The order of the circuit court is reversed, and the cause is remanded with directions to that court to dissolve the injunction.

II. Discretionary Acts.

WILLIAM C. HARRISON ET AL. V. CITY OF NEW ORLEANS ET AL.

Supreme Court of Louisiana. February, 1881.
33 La. Ann. 222.

The opinion of the court was delivered by

Todd, J. The plaintiff sued out an injunction against the mayor and administrators of the city of New Orleans and Common Council thereof to restrain them from passing or voting upon any ordinance "concerning the right of way to the New Orleans Pacific Railroad Company, or any company, to lay or erect tracks upon Thalia street, from Claiborne street to the levee, or authorizing said tracks to be laid in said streets."

The defendants excepted, on the ground that the petition disclosed no cause of action, which exception was sustained, the suit dismissed and injunction dissolved.

From this judgment the plaintiffs have appealed.

The judgment of the court *a qua* is correct.

In a recent case, decided by this court, *Slaughterhouse Co.* v. *Police Jury of Jefferson*, Opinion Book 53, folio 546, we held that no injunction would lie to restrain a municipal corporation from passing or voting on any ordinance. In fact, this principle is elementary. Municipal corporations are clothed with legislative power, to be exercised according to their discretion, with reference to all subjects pertaining to their administrative functions. To allow them to be impeded or restrained in the exercise of these powers, at the will or caprice of any one who may believe that such or such act or ordinance might prove injurious to him, would interfere seriously with and completely disarrange the administration of the government of a city or other municipal corporation.

Besides, injunctions are designed or intended to prevent actual or impending injuries, and prohibit acts from which such injury, loss or damage must inevitably result.

In this case *non constat* that the city will ever pass the apprehended ordinance. If it is passed, *non constat* that the railroad company, or companies, will ever accept its terms, or exercise the privilege or franchise granted.

The mere voting on or passing the ordinance in question cannot *per se* do the plaintiff any possible injury. It will be time enough to complain, if it be a subject for complaint, when steps are taken, or a beginning made, to put the ordinance into actual execution.

The judgment appealed from is affirmed with costs.

DAVIS & PALMER V. MAYOR OF THE CITY OF NEW YORK.

Superior Court of the City of New York. February, 1853.
1 Duer's Reports 451.

BOSWORTH, J. The plaintiffs move for an attachment against Oscar W. Sturtevant, one of the aldermen of the city, to arrest him for a contempt of court, in disobeying an injunction order made in this action by a judge of this court, on the 27th of December, 1852.

. . . . . .

The judge to whom application was made for the injunction order, granted it on a verified complaint stating these facts to be true. Whether true or false is a question which we are not called upon to determine on this proceeding. To determine whether he had any jurisdiction to make the order, the complaint alone can be looked at, and everything contained in it and stated to be true in fact, must be deemed to be true for all the purposes of the question before us. It was on the facts stated in the complaint, and those only, that the order was made. If the judge, on those facts, had jurisdiction to make the order, it was the duty of those to whom it was directed to obey it, until they had procured it to be vacated. If he had jurisdiction to make the order, it is incontestable that it was his duty to make it, if the facts stated in the complaint are true.

According to the allegations in the complaint, the Common Council, against the objections of the mayor, were about to grant to Jacob Sharp and others, authority and power to construct and use a railway in Broadway, with liberty to charge each passenger five cents fare, on payment to the city of a license fee for each car run of only $20 per annum, while others stood ready to take the grant, and construct such a railway, and run cars with equal accommodations, and charge only three cents fare, and pay a license fee of $1,000 per annum.

As between two such propositions, there can be no pretence for saying that in the exercise of an honest discretion the former might be preferred to the latter. It is not a debatable question whether a license fee of $1,000 per car per annum is more advantageous to the city than one of $20, nor whether the interests of the community will be better subserved by each citizen being compelled to pay a fare of three cents, instead of five. Therefore, even if it can be successfully maintained, that the common council had the power to make the grant which the resolutions purport to make, it would be a gross abuse of power, and a flagrant violation of public duty, to make the grant as it was made, instead of making it to those who would pay, at the least, an additional million of dollars for it into the public treasury, and exact from the passengers only three cents fare, instead of five. Is it incontestable that such an abuse of power and violation of duty cannot be restrained by any court?

. . . . . .

The part of the charter or of any legislative act authorizing this to be done has not been pointed out. To make such a grant under such circumstances, even if the power exists to make any grant for the construction of a railway on the ground of its being "deemed

good, useful, or necessary for the good rule and government of the body corporate," or with a view to public convenience, would be a clear abuse of power and violation of duty.

No one can contend that it would promote public convenience, or tend to the good rule and government of the body politic, to compel every citizen to pay five cents fare, instead of three, or that the public treasury should be permitted to receive only $20 instead of $1,000 per annum for every car run.

. . . . . .

If such an abuse of power and breach of trust cannot be restrained, then the making of the grant could not have been restrained, if the purpose had existed and been avowed, to make it for the nominal consideration of one dollar.

That it may be restrained, is incontestable, as I think, both upon principle and authority.

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I am of the opinion that no objection either of form or substance, has been presented which can exonerate Mr. Sturtevant from the consequences of a deliberate and marked disobedience of the order, or which could furnish a respectable apology for the court for omitting to take such notice of it as is due to the interests of the public, and to a proper administration of justice in behalf of parties to suits. and of the whole community.

BRISTOL DOOR & LUMBER CO. V. CITY OF BRISTOL.

Supreme Court of Appeals of Virginia. June, 1899.
97 Va. 304.

HARRISON, J., delivered the opinion of the court.

At a regular meeting of the council of the city of Bristol, held February 4, 1896, a resolution was adopted declaring a certain building belonging to the appellant, known as "Buffum's Stalls," to be a nuisance and the mayor of the city directed to proceed to have the same abated as such.

On the 19th of March, 1896, the mayor of the city informed the appellant in writing of the action of the council and notified it that, unless the building in question was removed in thirty days from March 20th, 1896, he would proceed to enforce the ordinance of the

city, prescribing a fine of not less than one dollar, nor more than twenty dollars, for each day the building thereafter remained, and that, in addition thereto, he would have the same removed at the expense of appellant.

On the 20th day of April 1896, appellant applied to and obtained from the judge of the Corporation Court of the city of Bristol an injunction restraining the execution of the resolution of the city council, which injunction was dissolved by the decree appealed from on the 5th day of April, 1897, and the bill dismissed.

. . . . . .

The bill states a clear case for the intervention of a court of equity, and the demurrer thereto was properly overruled.

The facts alleged, if true, show that appellant was about to suffer, at the hands of appellee, an irreparable injury in the destruction of its property. In such cases the law is well settled that courts of equity have jurisdiction to restrain the proceedings of municipal corporations, where those proceedings encroach upon private rights, and are productive of irreparable injury.

. . . . . .

The question whether or not appellant's building is such a nuisance as called for its destruction, is one of the facts to be determined by the evidence. As already seen the case stated by appellee in its answer, which is all it attempts to prove, is that disorderly and lewd persons are allowed to occupy the building; that they are permitted to become filthy and unsightly objects, being a constant source of annoyance to all parties residing in their vicinity, and that the value of the surrounding property is thereby depreciated.

Had these charges been established the destruction of appellant's property would not have been justified. When a building is a nuisance only because of the uses to which it is devoted, the building itself cannot be pulled down to stop the nuisance.

. . . . . .

We have thus far dealt with the case of the appellee, as stated in its answer. The proof fails to sustain the case stated . . . . .

Without further commenting upon the evidence, it is sufficient to say that it satisfactorily shows that the building in question has been, in no sense, a nuisance since the ownership of the appellant.

For these reasons, the decree appealed from must be reversed, and this court will enter a decree perpetually enjoining the defendants in the court below from executing the resolution in question, of the council of the city of Bristol, directing the destruction of the building of appellant known as "Buffum's Stalls." *Reversed.*

III. Who May Apply.

CRAMPTON V. ZABRISKIE.

Supreme Court of the United States. October, 1879.
101 U. S. 601.

Mr. Justice Field delivered the opinion of the court.

On the 14th of December, 1876, the Board of Chosen Freeholders of the County of Hudson, in New Jersey, passed a resolution to purchase of the defendant, Crampton, certain real property in Jersey City, upon which to erect a court-house and other buildings for the county, at the price of $2,000 for every 2,500 square feet, the price at which he had previously offered to sell the same, and to issue to him in payment thereof bonds of the county, payable out of the amount appropriated and limited for the expenses of the next fiscal year, the bonds to run for one year and to draw interest at the rate of seven per cent per annum. The bonds were to be signed by the director at large and the collector of the county, and to be issued under its seal. On the 18th of December, Crampton executed and delivered to the board a conveyance of the property, which was accepted and recorded in the office of the register of deeds; and thereupon three bonds were executed and delivered to him, two of which were for the sum of $75,000 and one was for $75,720. No provision was made by the board for the payment of the bonds beyond the general declaration that they should be paid out of the amount appropriated and limited for the next fiscal year. By the law then in force the fiscal year commenced on the first day of December of each year, and the expenditures of the board were restricted to the amount raised by tax for that year, unless by the spread of an epidemic or a contagious disease a greater expenditure should be required; and the amount to be raised was to be determined at a meeting of the board to be held prior to July 15 of each year. Some of the resident tax-payers were dissatisfied with this issue of bonds without making definite provision for their payment by taxation and accordingly obtained from the Supreme Court of the State a writ of *certiorari* to review the proceedings of the board. The court adjudged the proceedings invalid, and set the same aside.

It does not appear that any attention was paid either by the board or Crampton to this judgment. The board did not reconvey or offer to reconvey the land to Crampton; nor did the latter return or offer to return to the board the bonds received by him. But,

on the contrary, Crampton commenced an action in the Circuit Court of the United States to enforce their payment. The present suit, therefore, is brought by other tax-payers of the county to compel the board to reconvey the land and Crampton to return the bonds, and to enjoin the prosecution of the action to enforce their payment.

The facts here stated are not contradicted; they are substantially admitted; and upon them the court below very properly rendered a decree for the complainants. Indeed, upon the simple statement of the case, it would seem that there ought to be no question as to the invalidity of the proceedings of the board. The object of the statute of New Jersey defining and limiting its powers would be defeated if a debt could be contracted without present provision for its payment in advance of a tax levy, upon a simple declaration that out of the amount to be raised in a future fiscal years it should be paid. The law, in terms, limits the expenditures of the board, with a single exception, to the amount to be raised by taxation actually levied, not by promised taxation in the future. And, as if this limitation was not sufficient, it makes it a misdemeanor in any member of the board to incur obligations in excess of the amount thus provided. It would be difficult to express in a more emphatic way the will of the legislature that the board should not incur for the county any obligations beyond its income previously provided by taxation; in other words, that the expenses of the county should be based upon and never exceed moneys in its treasury, or taxes already levied and payable there.

Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should

not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. . . . . .

Decree affirmed.

The injunction will not be issued to the President. Mississippi v. Johnson, 4 Wallace, 475. Other cases in this collection illustrating the use of the injunction against officers are Indianapolis Brewing Co. v. Claypool, 149 Ind. 193, to prevent officers acting under an unconstitutional law; Rogers v. Jacobs, 88 Ky. 502; Rogers v. Common Council, 123 N. Y. 173; Rushville Gas Co. v. Rushville, 121 Ind. 206, cases of taxpayers' actions to restrain unlawful expenditure of money; Evansville v. Miller, 146 Ind. 613, and Stewart v. Palmer, 74 N. Y. 183, to restrain collection of an assessment; and Metropolitan Board of Health v. Heister, 37 N. Y. 661 to restrain enforcement of ordinance declaring a nuisance. All *supra.*

See also, Bates & Guild Co. v. Payne, 194 U. S. 107; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94; Wheeler v. Philadelphia, 77 Pa. St. 338; Jacksonville Electric Light Co. v. Jacksonville, 36 Fla. 229; Sun, &c., Association v. The Mayor, 152 N. Y. 257.

CHAPTER XIII.

THE CERTIORARI.

I. Character of Act Reviewable.

DAVIS V. COUNTY COMMISSIONERS.

Supreme Judicial Court of Massachusetts. February, 1891.
153 Mass. 218.

Petition, by Richard B. Davis and Theodore Rust, for a writ of *certiorari* to quash the proceedings of the county commissioners of Hampshire in abolishing the crossing at grade of South street in the city of Northampton by the New York, New Haven and Hartford Railroad.

. . . . . .

C. Allen, J. The New York, New Haven and Hartford Railroad Company, having been allowed to take part in the argument in support of the order of the county commissioners, contends that the petitioners have no such standing or interest in the matter in controversy as to entitle them to be heard in court.

. . . . . .

The general doctrine is familiar, that, ordinarily, one cannot maintain a private action for a loss or damage which he suffers in common with the rest of the community, even though his loss may be greater in degree.

. . . . . .

Without dwelling upon other decided cases in Massachusetts, or elsewhere, we are of opinion that the petitioners would not be entitled to recover damages for the diminished value of their lands, that being a loss not peculiar to themselves, but the same in kind as that which is suffered by others who owned lands situated upon the same street, or other streets contiguous thereto. Although the doctrine may sometimes be rather harsh in its application to special cases, there are sound reasons on which it rests. The chief of these reasons are, that to hold otherwise would be to encourage many trivial suits, that it would discourage public improvements if a whole neighborhood were to be allowed to recover damages for such injuries to their estates and that the loss is of a kind which pur-

chasers of land must be held to have contemplated as liable to occur, and to have made allowance for in the price which they paid.

If, then, the petitioners could not maintain a private action for damages to their lands, it remains to be determined whether they are entitled to have a private remedy for setting aside the proceedings of the county commissioners in making the contemplated change in the crossing. . . . .

In the present case, inasmuch as the petitioners are not entitled to a private remedy for damages, we think they are not entitled to maintain a petition for a writ of certiorari to quash the proceedings of the county commissioners.

. . . . . .

The result arrived at by a majority of the court, upon both grounds is that the entry must be,

Petition dismissed.

See also Oliver v. Mayor, 63 N. J. L. 634, and State v. Paterson, 34 N. J. L. 163, *supra*, where the writ was used to review a legislative act.

PEOPLE EX REL. JOHN COPCUTT V. BOARD OF HEALTH OF YONKERS.

Court of Appeals of New York. November, 1893.
140 N. Y. 1.

This was a proceeding to review by *certiorari* the proceedings of the board of health of the city of Yonkers, by which certain dams upon the Nepperham river were determined to be nuisances and ordered to be removed.

. . . . . .

EARL, J. The disposition of this case turns largely upon the effect and the construction of the statutes constituting the board of health, and defining its powers and duties, and we will, therefore, first give attention to the statutes.

By chaper 184 of the Laws of 1881, an act to revise the charter of the city of Yonkers, it is provided in title nine that the mayor, the supervisor, the president of the common council, the president of the board of water commissioners, and president of the board of police and the health officer shall constitute the board of health of the city, and the board is given power, among other things, "to

suppress, abate and remove any public nuisance detrimental to the public health," and in addition to other remedies which it may possess by law, it is empowered to issue its warrant whenever necessary to the sheriff of the county of Westchester, or to any policeman of the city, authorizing and commanding him to forthwith suppress, abate and remove such public nuisance, at the expense of the lot whereon the nuisance exists, and of the owner thereof, to be enforced and collected as in the act provided. It is further provided that, in addition to the powers expressly granted in the act, the board shall "have and exercise all the powers now or at any time hereafter conferred upon boards of health in cities by any general law," and it is authorized to make ordinances, rules and regulations to carry into effect its powers, and to enforce observance of them by penalties and by action instituted in its name to recover penalties and to restrain and abate the nuisance. By chapter 270 of the Laws of 1885, the general act for the preservation of the public health, it is provided that the board of health in any city of the state, except the cities of New York, Brooklyn and Buffalo, shall have the power, and it shall be its duty, "to receive and examine into the nature of complaints or causes of danger or injury to life and health within the limits of its jurisdiction; to enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by appointed members or persons to inspect and examine the same, and all owners, agents and occupants shall permit such sanitary examinations, and said board of health shall furnish such owners, agents or occupants a written statement of results or conclusions of such examinations; and every such board of health shall have power, and it shall be its duty, to order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of its jurisdiction;" and "to make, without the publication thereof, such orders and regulations in special and individual cases, not of general application, as it may see fit, concerning the suppression and removal of nuisances." It is further authorized to abate nuisances ,and to impose penalties for the violation of its orders and regulations, and the violation of them is also made a misdemeanor, and it may commence actions to restrain and abate nuisances, and to enforce its orders and regulations.

A careful examination of the two acts shows that there is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises.

The right to such a hearing is not expressly given and cannot be implied from any language found in either act or from the nature of the subject dealt with in the acts. Boards of health and other like boards act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. There is no provision in the acts far calling or swearing witnesses, and there is no general law giving them power to do so. . . . . .

The question may be asked, how can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the constitution securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises whereon they are alleged to exist. Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as a matter of favor, but as a matter of right, and the right to a hearing must be found in the acts. *Stuart* v. *Palmer*, 74 N. Y. 183.

As we have said, there is no provision of law giving any party a right to a judicial hearing before these boards, and there is no provision making their determination final. If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgment of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions. Boards of health under the acts referred to cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance that gives them jurisdiction to act. Their acts declaring nuisances may be presumptively valid until questioned or assailed, for the same reasons which give presumptive legality to the acts of official persons under the maxim *omnia praesumuntur legitime facta donec probetur contrarium.*

What operation then does the order or ordinance of the board of health have under these acts? The nuisance actually existing and the jurisdiction having been regularly exercised, the order or ordinance has all the operation and effect provided in the act, and the persons who abate the nuisance have the protection which they would not have as private persons abating, not a private nuisance especially injurious to them, but a public nuisance injurious to the general public.

It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such, and if there be doubt whether it be a nuisance or not the board should proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do.

It may be further asked, what, under this view of the law, is the remedy of the owner of the property threatened with destruction or actually destroyed as a nuisance? He may have his action in equity to restrain the destruction of his property if the case be one where a court of equity under equitable rules has jurisdiction, or he may bring a common-law action against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he will have due process of law; and if he can show that the alleged nuisance does not in fact exist he will recover judgment notwithstanding the ordinance of the board of health. Thus the views we take of these acts and similar acts conferring powers upon local officers to proceed summarily upon their own view and examination furnish adequate protection to boards of health, to the public and to the property owners; and while these views are not supported by all the decided cases upon the subject, they have the support of the best reasons and of ample authority.

. . . . . .

. . . . . In *Hutton* v. *City of Camden*, 39 N. J. L. Rep. 122, it was held that the action of the board of health could not determine conclusively that a nuisance exists, and that such a conclusive determination could only be made in a regular course of law before an established court of law or equity. In *Underwood* v. *Green*, 42 N. Y. 140, the action was to recover the value of dead hogs removed under the direction of the city sanitary inspector, an officer clothed with judicial discretion, and acting under a city ordinance declar-

ing that all dead animals "be forthwith removed and disposed of by removal beyond the limits of the city or otherwise, so as most effectually to secure the public health;" and it was held that it must be shown, in order to justify the act, that the dead hogs were or would become in some way dangerous, or deleterious to public health. The following are also instructive authorities upon the same subject: *Mayor, &c., of New York* v. *Board of Health,* 31 How. Pr. Rep. 385; *Clark* v. *Mayor, etc., of Syracuse,* 13 Barb. 32; *Rogers* v. *Barker,* 31 id. 447; *Coe* v. *Schultz,* 47 id. 64; *Lawton* v. *Steele,* 119 N. Y. 226.

The result of these authorities is that whoever abates an alleged nuisance and thus destroys or injures private property, or interferes with private rights, whether he be a judicial officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril, and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy and is founded upon fundamental constitutional principles.

The way is now clear to the disposition of this case. The board of health did act and had a right to act upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by certiorari. *People ex rel.* v. *McCarthy,* 102 N. Y. 630.

. . . . . .

Our conclusion, therefore, is that the judgment of the general term should be affirmed, with costs.

All concur.

Judgment affirmed.

The writ of certiorari will not issue to the governor, State v. Rusk, 55 Wis. 465; and parties applying for it must have special interest. People v. Phillipps, 67 N. Y. 582.

II. Discretion of Court.

PEOPLE EX REL. WALDMAN V. POLICE COMMISSIONERS.

Court of Appeals of New York. November, 1880.
82 N. Y. 506.

Appeal from order of the General Term of the Supreme Court, in the first judicial department, affirming an order of Special Term which quashed a writ of *certiorari*, on hearing upon a return to the writ.

The writ was obtained to review the proceedings of the board of police commissioners of the city of New York, removing the relator from the position of clerk in the police department.

The relator was removed April 1, 1876; he applied for the writ March 1, 1878.

Danforth, J. The order made by the Special Term was that the writ be quashed, and it was intimated upon the argument that under the practice of this court in such cases the appeal must be dismissed, but at the request of the appellant's counsel the case was held, to enable him to hand up points and authorities to the contrary. We are still of the opinion that this trouble might have been spared. It has been frequently decided that the Supreme Court has a discretionary power to grant or withhold a common-law *certiorari*. *In re Mount Morris Square*, 2 Hill 28; *People ex rel. Vanderbilt* v. *Stillwell*, 9 N. Y. 531; *People ex rel. Davis* v. *Hill*, 53 Id. 547; *People ex rel. Hudson* v. *Board of Fire Commissioners*, 77 Id. 605. In these (and many other cases to the same effect might be cited) it was held that unreasonable delay in applying for the writ might be a ground for refusing it, and for quashing it even after a hearing on a return thereto. We cannot distinguish this case from those cited.

The relator was removed from office April 1, 1876. The writ of *certiorari* was applied for March 1, 1878. This delay might well be considered unreasonable, and as amounting to acquiescence in the action of the department. Such a question was not presented in *The People ex rel. The Citizens' Gas Company* v. *The Board of Assessors*, 39 N. Y. 81; the facts in that case are palpably unlike those now before us, and the learned judge who there delivered the opinion seems to have regarded it as an exception to the general rule. In *Stillwell's Case*, 19 N. Y. 531, a distinction is suggested upon which an appeal might lie, but it does not avail the appellant,

for in the case before us the Supreme Court neither annulled nor affirmed the proceedings complained of; nor does the language of the new Code, to which we are referred (§ 190, subds. 2 and 3) differ in meaning from that of the old (§ 11), which was in force when the cases above referred to were decided.

We think the appeal should be dismissed.

All concur.

Appeal dismissed.

The writ of certiorari will not issue if there is another adequate remedy, even a statutory appeal. Tucker's petition, 27 N. H. 405; Road in Selim's Grove, 2 S. & R. 419.

III. What is Reviewable.

PEOPLE EX REL. MASTERSON V. FRENCH.

Court of Appeals of New York. October, 1888.
110 N. Y. 494.

Ruger, Ch. J. The relator was tried before the police commissioners of New York, upon an issue formed by a plea of not guilty to a charge of conduct unbecoming an officer, with a specification alleging that during "his tour of duty at 4:50 p. m., October 14, 1887, he was so much under the influence of intoxicating liquor as to render him unfit for duty," and was found guilty and dismissed from the force.

. . . . . .

Upon a removal of the proceedings, resulting in the relator's dismissal, to the General Term by *certiorari*, that court reversed the order of the commissioners and reinstated the relator in his office upon the ground, as stated in the order of reversal, "that the facts proven are insufficient to authorize the judgment and determination by said commissioners."

We are not entirely clear as to what the General Term means by saying that their reversal is made for the reason that the facts proven are insufficient to authorize the decision of the commissioners. If this language be taken literally and held to mean just what it says, that the charge proved did not authorize the order made by the commissioners, the decision was manifestly erroneous. The order, as thus construed, presented a question of law simply

as to whether the board had authority, under the rule applicable to the subject, to dismiss an officer for the cause stated. Those rules expressly provide that any member of the police force may be reprimanded, forfeit his pay, or be dismissed from the service for either of the following offenses, viz.: Intoxication, neglect of duty, or conduct unbecoming an officer. The case is, therefore, brought directly within the letter and spirit of the rule, and fully justified the order of dismissal.

Under the practice prior to the Code, the General Term had power to examine the evidence returned upon a common law *certiorari*, only for the purpose of seeing whether the subordinate tribunal had kept within its jurisdiction, and that there was evidence legitimately tending to support its decision, and no rule of law affecting the right of the relator had been violated. *People ex rel. Murphy* v. *French*, 92 N. Y. 309; *People ex rel. Hart* v. *Bd. of Fire Comrs.* 82 id. 360.

By section 2140 of the Code of Civil Procedure their jurisdiction was somewhat enlarged, and they are now, when there is any competent proof of the charges made, authorized to review the facts and determine whether there was "upon all the evidence, such a preponderance of proof against the existence of any of those facts, that the verdict of a jury affirming the existence thereof, rendered in an action in the Supreme Court, triable by jury, would be set aside by the court as against the weight of evidence." It is quite impossible, we think, to bring this case within the class authorized to be reviewed by the General Term upon the facts. The fact in controversy under the issue made was whether, upon the occasion in question, the relator was rendered unfit for duty by reason of his intoxication.

The proof on this question was clear and positive, and practically undisputed on the trial. . . . . There was here no such conflict of evidence, much less such a preponderance of proof, as authorized a reversal by the General Term of the determination of the commissioners within the rule prescribed by the Code. Conceding the existence of an ailment on the part of the relator, as claimed by him, it affords no justification of his conduct. Neither does it produce conflict of evidence upon the issue tried, but operated, at the most, as a palliation of his offense entitling him, perhaps, to the favorable consideration of his judges in determining the degree of his punishment.

If, however, we should give a strained construction to the language of the General Term, and hold that they thereby intended to

pass upon the adequacy of the excuse offered by the relator, and determined that it was sufficient to purge the offense, we still think they exceeded the authority for review conferred upon them by the Code. Upon the view we take of the case, it stands as though the relator had pleaded guilty to the charge and alleged the extenuating circumstances in mitigation of the punishment which he had incurred by reason of his offense. This would present a question pertaining solely to the general government and discipline of the force, and must, from the nature of things, rest wholly in the discretion of the commissioners. Such a question we do not think reviewable in an appellate court. When a dereliction of duty on the part of an officer has been proved, the sufficiency of an excuse therefor, presents no question of law or fact for the courts, but is addressed solely to the judgment and discretion of those who are primarily charged with the duty of maintaining the discipline and efficiency of the force.

The government of a police force assimilates to that required in the control of a military body, and the interference of an extraneous power in its practical control and direction, must always be mischievous and destructive of the discipline and habits of obedience, which should govern its subordinate members. If its determinations upon all questions are subject to review, and appeals to some tribunal outside the force may be taken without restraint, it must necessarily lead to a want of respect towards their official superiors, and an impairment of the habits of obedience and discipline which are so essential to the efficiency and good conduct of a well regulated police force.

We are, therefore, of the opinion that this question was exclusively for the consideration of the commissioners, and that the appellate court had no authority to review the exercise of their discretion on the subject. *People ex rel. Hart* v. *Brd. of Fire Comrs., supra.*

The order of the General Term should be reversed and that of the commissioners affirmed, with costs against the relator in both courts.

All concur.

Ordered accordingly.

IV. Courts Having Jurisdiction.

EX PARTE VALLANDIGHAM.

Supreme Court of the United States. December, 1863.
1 Wall. 243.

This case arose on the petition of Clement L. Vallandigham for a *certiorari*, to be directed to the Judge Advocate General of the Army of the United States, to send up to this court, for its review, the proceedings of a military commission, by which the said Vallandigham had been tried and sentenced to imprisonment:

. . . . . .

Mr. Justice Wayne, ... delivered the opinion of the court:

. . . . . .

Our first remark upon *the motion for a certiorari* is, that there is no analogy between the power given by the Constitution and law of the United States to the Supreme Court, and the other inferior courts of the United States, and to the judges of them, to issue such processes, and the prerogative power by which it is done in England. The purposes for which the writ is issued are alike, but there is no similitude in the origin of the power to do it. In England the court of King's Bench has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a *certiorari* to have any indictment removed and brought before it; and where such *certiorari* is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United States derive authority to issue such a writ from the Constitution and the legislation of Congress. To place the two sources of the right to issue the writ in obvious contrast, and in application to the motion we are considering for its exercise in this court, we will cite so much of the third article of the Constitution as we think will best illustrate the subject.

"The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." "The judicial power shall extend to all cases in law and equity, arising under the Constitution and laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassa-

dors, other public ministers and consuls," &c., &c., and "*in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction.* In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." Then Congress passed the act to establish the judicial courts of the United States (1 Stat. at Large, 73, chap. 20), and in the 13th section of it declared that the Supreme Court shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or other domestic servants as a court of law can have or exercise *consistently with the laws of nations,* and original, but not exclusive jurisdiction, of suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party. In the same section, the Supreme Court is declared to have appellate jurisdiction in cases hereinafter expressly provided. In this section, it will be perceived that the jurisdiction given, besides that which is mentioned in the preceding part of the section, is an exclusive jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or domestic servants, as a court of law can have or exercise consistently with the laws of nations, and original but not exclusive jurisdiction of all suits *brought by ambassadors or other public ministers,* or in which a consul or vice-consul shall be a party, thus guarding them from all other judicial interference, and giving to them the right to prosecute for their own benefit in the courts of the United States. Thus substantially reaffirming the constitutional declaration, that the Supreme Court had original jurisdiction in all cases affecting ambassadors and other public ministers and consuls, and those in which a state shall be a party, and that it shall have appellate jurisdiction in all other cases before mentioned, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress. *Durousseau* v. *The United States*, 6 Cranch 314; *Barry* v. *Mercein*, 5 How. 119; *United States* v. *Curry*, 6 id. 113; *Forsyth* v. *United States*, 9 id. 571. In other words, the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court. It is not

in law or equity within the meaning of those terms as used in the 3d article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the judiciary act of 1789. That act is denominated to be one to establish the judicial courts of the United States, and the 14th section declares that all the "before-mentioned courts" of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, agreeably to the principles and usages of law. The words in the section, "the before-mentioned" courts, can only have reference to such courts as were established in the preceding part of the act, and excludes the idea that a court of military commission can be one of them.

Whatever may be the force of Vallandigham's protest, that he was not triable by a court of military commission, it is certain that his petition cannot be brought within the 14th section of the act; and further, that the court cannot, without disregarding its frequent decisions and interpretation of the Constitution in respect to its judicial power, originate a writ of *certiorari* to review or pronounce any opinion upon the proceedings of a military commission. It was natural, before the sections of the 3d article of the Constitution had been fully considered in connection with the legislation of Congress, giving to the courts of the United States power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which might be necessary for the exercise of their respective jurisdiction, that by some members of the profession it should have been thought, and some of the early judges of the Supreme Court also, that the 14th section of the act of 24th September, 1789, gave to this court a right to originate processes of *habeas corpus ad subjiciendem,* writs of *certiorari* to review the proceedings of the inferior courts as a matter of original jurisdiction, without being in any way restricted by the constitutional limitation, that in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. This limitation has always been considered restrictive of any other original jurisdiction. *The rule of construction of the Constitution being that affirmative words in the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases. Marbury* v. *Madison,* 1 Cranch 137; *State of New Jersey* v. *State of New York,* 5 Peters 284; *Kendall* v. *The United States,* 12 id. 637; *Cohens* v. *Virginia,* 6 Wheaton

264. The nature and extent of the court's appellate jurisdiction and its want of it to issue writs of *habeas corpus ad subjiciendum* have been fully discussed by this court at different times. We do not think it necessary, however, to examine or cite many of them at this time.

. . . . . .

For the reasons given, our judgment is, that the writ of *certiorari* prayed for to revise and review the proceedings of the military commission, by which Clement L. Vallandigham was tried, sentenced and imprisoned, must be denied, and so do we order accordingly.

Certiorari refused.

NELSON, J., GRIER, J., and FIELD, J., concurred in the result of this opinion. MILLER, J., was not present at the argument and took no part.

CHAPTER XIV.

QUO WARRANTO.

PEOPLE EX REL. BARTON V. LONDONER.

Supreme Court of Colorado. September, 1889.
13 Colo. 303.

Chief Justice HELM delivered the opinion of the court.

1. It is asserted by respondent that the district court had no jurisdiction to entertain the present proceeding, and that court itself so declared when discussing the petition. The assertion and judgment are based upon the following statute, and certain constitutional provisions hereinafter considered: "If the election of a mayor . . . . shall be contested, the contest shall be heard and determined by the board of supervisors, under rules which said board shall establish for such hearing." Denver City Charter, art. 4, § 9.

. . . . . .

Does the language employed in the statute above quoted operate to deprive the courts of jurisdiction in the premises by *quo warranto?*

Quo warranto is one of the most ancient and important writs known to the common law; the modern proceeding by information, which has almost entirely superseded the ancient writ, being itself nearly two hundred years old. This jurisdiction is expressly given to the supreme court by our constitution. It is also, beyond doubt, included in the powers conferred by that instrument upon the district courts, where, however, its exercise may be as regulated by statute. It receives express legislative recognition; its ancient use and efficacy being by statute united with its modern, enlarged scope. And while a few cases hold the contrary, the great weight of authority, as well as the better reason, supports the proposition that, unless the legislative intent to take away the jurisdiction is expressed so clearly as to be practically beyond a reasonable doubt, it will be regarded as undisturbed. Such intent does not thus appear in the statute before us. The board of supervisors is not made the "sole" or "exclusive" tribunal to try the contest for mayor, nor

are any words employed expressly eliminating the judicial jurisdiction in question. Provisions substantially similar to the one before us have been held to create a cumulative remedy merely, and not to inhibit proceedings by *quo warranto*. . . . .

The fact that the jurisdiction of State legislative bodies in election contests affecting their own members has universally been held exclusive does not render such jurisdiction when lodged in a municipal corporation also exclusive. The reasoning in those cases which rely upon the supposed analogy between the legislature and council has been shown fallacious. . . . .

So far as this branch of the discussion is concerned, which is confined to the language of the provision cited, we must hold the statutory remedy under consideration concurrent with the prescribed code proceeding by information in the nature of *quo warranto*.

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Because the constitution, in section 12, article 7, directs specific legislation for the trial of "election contests," it does not necessarily follow that the people, in their sovereign capacity, are thereby precluded from inquiring by information in the nature of *quo warranto* into usurpations of office. The framers of that instrument were, in this provision, dealing with the subject of *election contests as such*. They did not intend to revoke the jurisdiction by *quo warranto* so carefully given by them elsewhere to this and other courts (Const. art. 6, §§ 3, 11),—a jurisdiction which, though recognized at the common law, had also been, and then was, specially lodged in the territorial courts by existing statute.

"Election contests" and *quo warranto* proceedings differ materially in the primary and principal objects for which they are brought, as well as in their procedure. "Election contests," purely, are usually instituted within a prescribed period after the election, by or on behalf of the unsuccessful candidate, for the purpose of establishing his right to the particular office in controversy. And though our statutes permit any elector, upon giving security for costs, to challenge in this way the right to occupy certain county offices, yet neither in this nor in any other contesting provision of which we are aware, is authority given any public officer or private individual to institute a proceeding, in the name of the state, having for its distinctive purpose the protection of the public. *Quo warranto* proceedings, on the contrary, deal mainly with the right of the incumbent to the office, independent of the question who shall fill it. They are brought in the name

and on behalf of the people, to determine whether the incumbent has unlawfully usurped or intruded into, or is unlawfully holding, the office. They are not primarily, in the interest of any individual, but are intended to protect the public generally against the unlawful usurpation of offices and franchises. It is true that, in the absence of a contesting statute, the common-law remedy by information is invoked by contesting claimants, though the relief obtained is inadequate because the proceeding stops with the ouster; the contestant not being seated. 2 Dill. Mun. Corp. §§ 842-844. Such practice would be more readily adopted, under like circumstances, in this State, since the proceeding by information, made statutory, has been so enlarged as to permit the adjudication of the claimant's right to possession as well as the incumbent's title. Code, ch. 28. But the public and prerogative function of this proceeding is still, under our information statute, its most important characteristic, and the trial of a contestant's claim is secondary and subordinate.

It by no means follows that because one person unlawfully intrudes into or holds an office another is entitled thereto. The incumbent may have a majority of all the votes cast, but nevertheless be a wrongdoer. He may have been primarily ineligible or have become subsequently disqualified. If, in such case, he be ousted from the office, his opponent is not installed. A vacancy exists and a new election follows. *Darrow* v. *People, supra.* The proceeding by the people, through which the intruder is turned out and the vacancy created, is not an "election contest" within the meaning of this constitutional phrase; nor is a similar investigation by the people for frauds that, perchance, were not discovered till the time for the ordinary statutory election contest had passed, such a proceeding. The incumbency, in all such cases, is a public wrong; and for this reason the people demand the removal. The office, like the franchise, in an important sense belongs to the people, and they simply assert their right to have it filled according to law, regardless of the private interest of any contestant or claimant.

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It follows from the foregoing that, in our judgment, statutes passed by the legislature, in obedience to the constitutional mandate on the subject of contested elections, do not prevent inquiry by *quo warranto* by the people into usurpations and unlawful holdings of office.

We are aware that this conclusion is not in harmony with the

view taken in Ohio and Missouri, under constitutional provisions substantially similar. *State* v. *Marlow,* 15 Ohio St. 114; *State* v. *Francis, supra.*

But, with all due respect to those able courts, we believe it rests upon sounder principles of law, as well as wiser considerations of public policy. Surely, doubts, if they exist, should be resolved in favor of this jurisdiction by the courts. It is a matter of the greatest public importance whether ineligible or disqualified persons, or persons who by election frauds have secured an apparent majority of the votes, shall be permitted to usurp and hold public offices. Except upon legislation, constitutional or statutory, so clear as to be irresistible, the voice of the people in this matter should not be silenced.

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3. The declaration in section 8, article 7, of the constitution, that the ballots may be examined in contested elections, does not limit this examination to such proceedings. The right mentioned has always been freely exercised in *quo warranto,* which is the common-law method of inquiring into election frauds. And the purpose of this provision was to give, in the election contests authorized by section 12 of the same article, already considered, the privilege of inspecting and comparing ballots; not to withdraw it from the proceeding in which theretofore it had been universally exercised. The leading object of said section 8 was to preserve the purity of the ballot by insuring its secrecy; but, lest the language indicating this intent should be carried too far, and become the means of perpetrating fraud, the privilege in question was carefully extended to election contests, in which, perhaps, it might otherwise have been challenged.

4. Chapter 27, Code of Civil Procedure (Laws 1887, p. 182), is a substitute for the original common-law *quo warranto* remedy. It prescribed an enlarged proceeding, substantially by information in the nature of *quo warranto,* and furnishes the exclusive method, so far as district courts are concerned, for investigating usurpations of office. The district attorney having refused to act in the present case, relator was expressly authorized by this statute to institute the proceeding. Being a "freeholder, resident and elector" within the city of Denver, relator's capacity to proceed in the name of the people cannot be challenged on the ground of insufficiency of interest. The fact that he was the opposing candidate, and claims to have received a majority of the votes legally cast, does not work his disqualification. It may be that he is more in-

terested in vindicating his alleged private right than he is in redressing the supposed public wrong. But this fact, if it be a fact, does not justify our refusal to investigate in this case the alleged usurpation, and render such judgment as the law permits and the public welfare requires. A certain degree of interest on the part of relators in *quo warranto* proceedings is generally deemed requisite; and the officious intermeddling by parties having absolutely no interest, either as taxpayers or voters, is disfavored.

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The foregoing views harmonize in the main with those expressed by the two opinions in *Darrow* v. *People, supra.* It will be observed by reference to those opinions that the specific object under section 12, article 7, of the constitution, last above noticed, was not then considered. In so far, however, as the language there employed would seem to recognize the right of a contesting claimant to ignore the constitutional, statutory, election-contest remedy, and have his personal claims to office adjudicated in the proceeding by information, it is qualified in accordance with the conclusion above stated.

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The demurrer should have been overruled, and the judgment is accordingly reversed.

Reversed.

Other instances in this collection of the use of the quo warranto or its statutory substitute to try title to office in election contests are Boyd v. Mills, 53 Kan. 594; People v. Van Cleve, 1 Mich. 362; People v. Clute, 50 N. Y. 451; State v. Taylor, 108 N. C. 196; Smith v. Moore, 90 Ind. 294, *supra*.

STATE EX REL. CLEMENTS V. HUMPHRIES.

Supreme Court of Texas. 1889.
74 Tex. 466.

Appeal from Mills. Tried before Hon. W. A. Blackburn.

The opinion states the case.

GAINES, Associate Justice. This was an information in the nature of a quo warranto filed in the name of the state upon the relation of P. H. Clements, for the purpose of ousting the appellee from the office of the clerk of the county court of Mills County.

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Does the fact that the respondent held out a promise to the

voters of the county to serve in case of election for a less compensation than the lawful fees of the office disqualify him for holding it? Section 1 of article 16 of our Constitution requires every officer before he enters upon the duties of his office to take an oath or affirmation which embraces the following language: "And I furthermore solemnly swear (or affirm) that I have not directly nor indirectly paid, offered, or promised to pay, contributed nor promised to contribute any money or valuable thing, or promised any office or employment as a reward for the giving or withholding a vote at the election at which I was elected." It may be that an offer by a candidate for county clerk to remit in case of his election his fees for *ex officio* services should be deemed an offer to contribute to each taxpayer his proportion of the taxes necessary to raise the sum so remitted.

In *Caruthers* v. *Russell*, 53 Ia. 346 (S. C., 36 Am. Rep. 222), the Supreme Court of Iowa held such a promise virtually an offer to bribe the voters, and it seems to be within the spirit if not the letter of the constitutional provision above quoted. But it does not follow that in the absence of some other constitutional or statutory provision that a candidate who has made such promise and has received the highest number of votes and has taken the required oath can be removed from office by the mere proof of the fact in the proceeding in which he is sought to be ousted.

The case of *The Commonwealth* v. *Jans*, 10 Bush 725, is an authority bearing upon the question. The constitution of Kentucky requires every person before accepting office to take an oath that he has not fought a duel or sent or accepted a challenge to fight a duel. In this respect the oath is practically the same as is required by our consitution. Like ours that constitution also contained the further provision which declared that any one who had fought a duel or sent or accepted a challenge should be disqualified from holding office. In the case cited it was held that a party who had been elected to an office and who had qualified by taking the prescribed oath could not be deprived of his office until he had been legally convicted of the offense of having sent a challenge in a proper criminal proceeding upon an indictment charging him with that offense. From the rule so established it would follow that if section one of article 16 stood as the only provision upon this subject, and if it should be construed to embrace within its terms the act complained of in this proceeding, the respondent could not be deprived of his office upon this ground until he had been lawfully indicted and convicted of the offense.

But we need not go so far. The constitution has another provision upon this matter. Section 5 of the article already cited provides "that every person shall be disqualified from holding any office of profit or trust in this state who shall be convicted of having given or offered a bribe to procure his election or appointment." If, therefore, it should be held that the act of the respondent was within the meaning of the law an offer to bribe voters, it follows from the section quoted that he could not be deprived of the office until he had been convicted of the offense in a court of competent jurisdiction in a proceeding instituted and prosecuted according to the provisions of our Code of Criminal Procedure.

We conclude that our constitution does not warrant the removal of the respondent from office for the act charged against him in a proceeding of this character before a legal conviction of the offense.

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We are constrained, therefore, to hold that neither under our constitution nor by the common law can the respondent be deprived of the office he holds under the allegations and proof made in this case.

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There is no error in the judgment and it is affirmed.

Affirmed.

Instances in this collection of the use of the quo warranto or its statutory substitute to oust one from office on the allegation that he is disqualified or otherwise ineligible, or improperly appointed, are Bradley v. Clark, 133 Cal. 196; Attorney General v. Marston, 66 N. H. 485; De Turk v. Commonwealth, 129 Pa. St. 151; Gray v. Seitz, 162 Ind. 1; Fritts v. Kuhl, 51 N. J. L. 191; People v. Ward, 107 Cal. 236; Reiter v. State, 51 Ohio St. 74; People v. Murray, 70 N. Y. 521, *supra*.

Quo warranto is also used to oust one holding over improperly as e. g. after having been removed or suspended, or after expiration of term, see Attorney General v. Jochim, 99 Mich. 358; State v. Bulkley, 61 Conn. 287; State v. Chatburn, 63 Iowa 659; State v. Kennedy, 75 Conn. 704; State v. Hillyer, 2 Kan. 17; State v. Megaarden, 85 Minn. 41, *supra*.

An instance of a criminal action to punish usurpation is Kreidler v. State, 24 Ohio St. 22, *supra*.

See also on the general subject of the quo warranto Field v. People, 3 Ill. 79; Dullam v. Willson, 53 Mich. 392; Attorney General v. Oakman, 126 Mich. 717; Commonwealth v. Waller, 145 Pa. St. 235; Commonwealth v. Moir, 199 Pa. St. 534.

Quo warranto may be issued to one claiming the right to exercise the office of governor, State v. Bulkley, 61 Conn. 287, *supra*.

CHAPTER XV.

THE HABEAS CORPUS.

1. Physical Restraint.

WALES V. WHITNEY.

Supreme Court of the United States. October, 1884.
114 U. S. 564.

Mr. Justice Miller delivered the opinion of the court.

This is an appeal from the judgment of the Supreme Court of the District of Columbia, which refused to make an order on a writ of *habeas corpus* relieving the appellant from the custody of the appellee, who, it is alleged, held the appellant in restraint of his liberty unlawfully.

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The original petition . . . . sets out an order of the Secretary of the Navy, under which this restraint is exercised, which order is in the following terms:

"Washington, February 28th, 1885.

"Sir: Transmitted herewith you will receive charges, with specifications, preferred against you by the department.

A general court-martial has been ordered to convene in rooms numbered 32 and 33, at the Navy Department, at Washington, D. C., at 12 o'clock noon, on Monday, the 9th proximo, at which time and place you will appear and report yourself to Rear Admiral Edward Simpson, United States Navy, the presiding officer of the court, for trial. The Judge Advocate will summon such witnesses as you may require for your defense.

You are hereby placed under arrest, and you will confine yourself to the limits of the city of Washington.

Very respectfully,

Wm. E. Chandler,
Secretary of the Navy.

Medical Director
Philip S. Wales,
U. S. N., Washington, D. C."

. . . . . .

Two questions have been elaborately argued before us, namely:

1. Does the return of the Secretary of the Navy to the writ and its accompanying exhibits show such restraint of the liberty of the petitioner by that officer, as justifies the use of the writ of *habeas corpus?*

2. If there is a restraint, which, in its character, demands the issue of the writ, are the charges for which the petitioner is required to answer the naval court-martial of the class of which such a court has jurisdiction?

The latter is a question of importance, and not free from difficulty, since its solution requires the court to decide whether the Surgeon-General of the Navy, as Chief of the Bureau of Medicine and Surgery, in the Department of the Navy, under the immediate supervision of the Secretary, is liable for any failure to perform his duties as Surgeon-General, to be tried by a military court, under the articles of war governing the Navy, or has a right for such offenses to be tried alone by the civil courts, and according to the law for offenses not military. Is he, in that character, in the civil or military service of the United States? The difficulty of stating the question shows the embarrassment attending its decision.

The other question, however, has precedence, both because it is the one on which the court of the District decided the case, because, if there was no such restraint, whether legal or illegal, as to call for the use of the writ, there is no occasion to inquire into its cause.

It is obvious that petitioner is under no physical restraint. He walks the streets of Washington with no one to hinder his movements, just as he did before the Secretary's order was served on him. It is not stated as a fact in the record, but it is a fair inference, from all that is found in it, that, as Medical Director, he was residing in Washington and performing there the duties of his office. It is beyond dispute that the Secretary of the Navy had the right to direct him to reside in the city in performance of these duties. If he had been somewhere else the Secretary could have ordered him to Washington as Medical Director, and, in order to leave Washington lawfully, he would have to obtain leave of absence. He must, in such case, remain here until otherwise ordered or permitted. It is not easy to see how he is under any restraint of his personal liberty by the order of arrest, which he was not under before. Nor can it be believed that, if this order had made no reference to a trial on charges against him before a court-martial, he would have felt any restraint whatever, though it had directed him to remain in the city until further orders. If the

order had directed him so to remain, and act as a member of such court, can anyone believe he would have felt himself a prisoner, entitled to the benefit of a writ of *habeas corpus?*

On the other hand, there is an obvious motive on the part of the petitioner for construing this order as making him a prisoner in the custody of the Secretary.

That motive is to have himself brought before a civil court, which, on inquiry into the cause of his imprisonment, may decide that the offense with which the Secretary charges him is not of a military character, is not one of which a naval court-martial can entertain jurisdiction, and, releasing him from the restraint of the order of arrest, it would incidentally release him from the power of that court.

But neither the Supreme Court of the District nor this court has any appellate jurisdiction over the naval court-martial, nor over offenses which such a court has power to try. Neither of these courts is authorized to interfere with it in the performance of its duty, by a writ of prohibition or any order of that nature. The civil courts can relieve a person from imprisonment under order of such court only by writ of *habeas corpus,* and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint there is no right in the civil court to interfere. Its power *then* extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court. Whatever effect the decision of the court may have on the proceedings, orders or judgments of the military court, is incidental to the order releasing the prisoner. Of course, if there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere with the military court, or other tribunal over which it has by law no appellate jurisdiction.

The writ of *habeas corpus* is not a writ of error, though in some cases in which the court issuing it *has* appellate power, over the court by whose order the petitioner is held in custody, it may be used with the writ of *certiorari* for that purpose. In such cases, however, as the one before us, it is not a writ of error. Its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful it must then discharge the prisoner.

There is no very satisfactory definition to be found in the ad-

judged cases of the character of restraint or imprisonment suffered by a party applying for the writ of *habeas corpus,* which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief. Confinement under civil and criminal process may be relieved. Wives restrained by husbands, children withheld from the proper parent or guardian, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus.* Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed.

In the case of a man in the military or naval service, where he is, whether as an officer or a private, always more or less subject to his movements, by the very necessity of military rule and subordination, to the orders of his superior officer, it should be made clear that some unusual restraint upon his liberty of personal movement exists to justify the issue of the writ; otherwise every order of the superior officer directing the movements of his subordinate, which necessarily to some extent curtails his freedom of will, may be held to be a restraint of his liberty, and the party so ordered may seek relief from obedience by means of a writ of *habeas corpus.*

Something more than moral restraint is necessary to make a case for *habeas corpus.* There must be actual confinement or the present means of enforcing it. The class of cases in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition. The officer has the authority to arrest and the power to enforce it. If the party named in the writ resists or attempts to resist, the officer can summon bystanders to his assistance, and may himself use personal violence. Here the force is imminent and the party is in presence of it. It is a physical power which controls him, though not called into demonstrative action.

It is said in argument that such is the power exercised over the appellant under the order of the Secretary of the Navy. But this is, we think, a mistake. If Dr. Wales had chosen to disobey this order, he had nothing to do but take the next or any subsequent train from the city and leave it. There was no one at hand to hinder him. And though it is said that a file of marines or some proper officer could have been sent to arrest and bring him

back, this could only be done by another order of the Secretary, and would be another arrest, and a real imprisonment under another and distinct order. Here would be a real restraint of liberty, quite different from the first. The fear of this latter proceeding, which may or may not keep Dr. Wales within the limits of the city, is a moral restraint which concerns his own convenience, and in regard to which he exercises his own will.

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While the acts of Congress concerning this writ are not decisive, perhaps, as to what is a restraint of liberty, they are evidently framed in their provisions for proceedings in such cases on the idea of the existence of some actual restraint. Rev. Stat. § 754 says the application for the writ must set forth "in whose custody he (the petitioner) is detained, and by virtue of what claim or authority, if known;" § 755, that "the writ must be directed to the person in whose custody the party is;" § 757, that this person shall certify to the court of justice before whom the writ is returnable the true cause of the detention; and by § 758 he is required "at the same time to bring the body of the party before the judge who granted the writ."

All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary.

In case of a person who is going at large, with no one controlling or watching him, or detaining him, his body cannot be produced by the person to whom the writ is directed, unless by consent of the alleged prisoner, or by his capture and forcible traduction into the presence of the court.

The record in the present case shows that no such thing was done. The Secretary denies that Wales is in his custody, and he does not produce his body; but Wales, on the direction of the Secretary, appears without any compulsion, and reports himself to the court and to Justice Cox as he did to the court-martial.

We concur with the Supreme Court of the District in the opinion that the record does not present such a case of restraint of personal liberty as to call for discharge by a writ of *habeas corpus*.

In thus deciding we are not leaving the appellant without remedy if his counsel are right in believing the court-martial has no jurisdiction of the offense of which he is charged. He can make that objection to that court before trial. He can make it before judg-

ment after the facts are all before the court. He can make it before the reviewing tribunal.

If that court finds him guilty, and imposes imprisonment as part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped, in whole or in part, he can do the same thing. In all these modes he can have relief if the court is without jurisdiction, and the inquiry into that jurisdiction will be more satisfactory after the court shall have decided on the nature of the offense for which it punishes him than it can before. And this manner of relief is more in accord with the ordinary administration of justice and the delicate relations of the two classes of courts, civil and military, than the assumption in advance by the one court that the other will exercise a jurisdiction which does not belong to it.

The judgment of the Supreme Court of the District of Columbia is

Affirmed.

II. Judgments of Courts.

EX PARTE WATKINS.

Supreme Court of the United States. January, 1830.
3 Peters 192.

Mr. Chief Justice Marshall delivered the opinion of the court.

This is a petition for a writ of *habeas corpus* to bring the body of Tobias Watkins before this court for the purpose of inquiring into the legality of his confinement in jail. The petition states that he is detained in prison by virtue of a judgment of the Circuit Court of the United States, for the county of Washington, in the District of Columbia, rendered in a criminal prosecution carried on against him in that court. A copy of the indictment and judgment is annexed to the petition, and the motion is founded on the allegation that the indictment charges no offense for which the prisoner was punishable in that court, or of which that court could take cognizance; and consequently that the proceedings are *coram non judice,* and totally void.

This application is made to a court which has no jurisdiction in

criminal cases (3 Cranch 169); which could not revise this judgment; could not reverse or affirm it, were the record brought up directly by writ of error. The power, however, to award writs of *habeas corpus* is conferred expressly on this court by the fourteenth section of the judicial act and has been repeatedly exercised. No doubt exists respecting the power; the question is, whether this be a case in which it ought to be exercised. The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded to prison.

No law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the Constitution as one which was well understood; and the judicial act authorizes this court, and all the courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment." This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use, according to that law which is in a considerable degree incorporated into our own. The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. The English judges, being originally under the influence of the crown, neglected to use this writ where the government entertained suspicions which could not be sustained by evidence; and the writ when issued was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil the celebrated *habeas corpus* act of the 31st of Charles II was enacted, for the purpose of securing the benefits for which the writ was given. This statute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law. This statute excepts from those who are entitled to its benefits, persons committed for felony or treason plainly expressed in the warrant, as well as persons convicted or in execution.

The exception of persons convicted applies particularly to the application now under consideration. The petitioner is detained in prison by virtue of the judgment of a court, which court posses-

ses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of *habeas corpus?*

This writ is, as has been said, in the nature of a writ of error, which brings up the body of the prisoner with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not the judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and re-examine the charges upon which it was rendered? A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it.

The counsel for the prisoner admit the application of these principles to a case in which the indictment alleges a crime cognizable in the court by which the judgment was pronounced; but they deny their application to a case in which the indictment charges an offense not punishable criminally according to the law of the land. But with what propriety can this court look into the indictment? We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The Circuit Court of the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court, is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it.

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Without looking into the indictment under which the prosecution against the petitioner was conducted, we are unanimously of opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought not to be awarded.

On consideration of the rules granted in this case, on a prior day of this term, to wit, on Tuesday, the 26th of January of the present term of this court, and of the arguments thereupon had; it is considered, ordered and adjudged by this court, that the said rule be, and the same is hereby, discharged, and that the prayer of the petitioner for a writ of *habeas corpus* be, and the same is hereby,

Refused.

The rule of the principal case that the writ will issue only on probable cause shown, is not adopted in all states, Nash v. People, 36 N. Y. 607, while in some states its issue may be forced by mandamus, Ex parte Mahone, 30 Ala. 49. Where its issue is not merely ministerial, its allowance or refusal is appealable. Ex parte Milligan, 4 Wall. 2.

III. Excess of Jurisdiction.

EX PARTE REED.

Supreme Court of the United States. October, 1879.
100 U. S. 13.

Mr. Justice Swayne delivered the opinion of the court.

There is no controversy in this case about the facts. The questions we are called upon to consider are all questions of law. A brief summary of the facts will therefore be sufficient.

The petitioner, Reed, was a clerk of a paymaster in the navy of the United States. He was duly appointed and had accepted by a letter, wherein, as required, he bound himself "to be subject to the laws and regulations for the government of the navy and the discipline of the vessel." His name was placed on the proper muster-roll, and he entered upon the discharge of his duties. While serving in this capacity, charges of malfeasance were preferred against him, and on the 26th of June, 1878, he was directed by Rear Admiral Nichols to appear and answer before a general court-martial, convened pursuant to an order of that officer on board the United States ship "Essex," then stationed at Rio Janeiro, in Brazil. The court found the petitioner guilty, and sentenced him ac-

cordingly. The admiral declined to approve the sentence, and remitted the proceedings back to the court, that the sentence might be revised.

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This sentence was different from the preceding one in two particulars, and in both it was more severe. It was approved by the admiral and ordered to be carried out. The court was subsequently dissolved. While in confinement, under the sentence, on board a naval vessel at Boston, the petitioner sued out a writ of *habeas corpus,* and brought his case before the Circuit Court of the United States for the District of Massachusetts. After a full hearing, that court adjudged against him, and ordered him back into the custody of the naval officer to whom the writ was addressed. The petitioner thereupon made this application in order that the conclusions reached by the Circuit Court may be reviewed by this tribunal.

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Three points in support of the petition have been brought to our attention. It is insisted—

1. That the court had no jurisdiction to try a paymaster's clerk.

2. That when the first sentence was pronounced, the power of the court was exhausted, and that the second sentence was, therefore, a nullity.

3. That the court could revise its former sentence only on the ground of mistake, and that there was no mistake, and consequently no power of revision.

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The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court.

We do not overlook the point that there must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause. If a magistrate having the authority to fine for assault and battery should sentence the offender to be imprisoned in the peni-

tentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. Every act of a court beyond its jurisdiction is void. *Cornett* v. *Williams,* 20 Wall. 226; *Windsor* v. *McVeigh,* 93 U. S. 274; 7 Wait's Actions and Defences, 181. Here there was no defect of jurisdiction as to anything that was done. Beyond this we need not look into the record. Whatever was done, that the court could do under any circumstance, we must presume was properly done. If error was committed in the rightful exercise of authority, we cannot correct it.

A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the prisoner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void. *Ex Parte Kearney,* 7 Wheat. 38; *Ex parte Watkins,* 3 Pet. 193; *Ex parte Milligan,* 4 Wall. 2.

The application for the petition is, therefore, denied.

EX PARTE SIEBOLD.

Supreme Court of the United States. October, 1879.
100 U. S. 371.

Petition for writ of *habeas corpus.*

The facts are stated in the opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

The petitioners in this case, Albert Siebold, Walter Tucker, Martin C. Burns, Lewis Coleman and Henry Bowers, were judges of election at different voting precincts in the city of Baltimore, at the election held in that city, and in the State of Maryland, on the fifth day of November, 1878, at which representatives to the Forty-sixth Congress were voted for.

At the November Term of the Circuit Court of the United States for the District of Maryland, an indictment against each of the petitioners was found in said court, for offences alleged to have been committed by them respectively at their respective precincts whilst being such judges of election; upon which indictments they were severally tried, convicted, and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of *habeas corpus* to be relieved from imprisonment.

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. . . . . The records of the several indictments and proceed-

ings thereon were annexed to the respective original petitions, and are before us. These indictments were framed partly under sect. 5515 and partly under sect. 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective franchise, which they are intended to enforce, are within the constitutional power of Congress to enact. If they are not, then it is contended that the Circuit Court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void.

The jurisdiction of this court to hear the case is the first point to be examined. The question is whether a party imprisoned under a sentence of a United States court, upon conviction of a crime created by and indictable under an unconstitutional act of Congress, may be discharged from imprisonment by this court on *habeas corpus*, although it has no appellate jurisdiction by writ of error over the judgment. It is objected that the case is one of original and not appellate jurisdiction, and, therefore, not within the jurisdiction of this court. But we are clearly of opinion that it is appellate in its character. It requires us to revise the act of the Circuit Court in making the warrants of commitment upon the convictions referred to. This, according to all decisions, is an exercise of appellate power. *Ex parte Burford,* 3 Cranch 448; *Ex parte Bollman and Swartwout.* 4 id. 100; *Ex parte Yerger,* 8 Wall. 98.

That this court is authorized to exercise appellate jurisdiction by *habeas corpus* directly is a position sustained by abundant authority. It has general power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are, that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers and consuls, and cases in which a state is a party; but has appellate jurisdiction in all other cases of federal cognizance, "with such exceptions and under such regulations as Congress shall make." Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction; and may issue it in the exercise of appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law except those in which it has original jurisdiction only. *Ex parte Bollman and Swartwout, supra; Ex parte Watkins,* 3 Pet. 202; 7 id. 568; *Ex parte Wells,* 18 How. 307, 328; *Ableman* v. *Booth,* 21 id. 506; *Ex parte Yerger,* 8 Wall. 85.

There are other limitations of the jurisdiction, however, arising from the nature and objects of the writ itself, as defined by the common law, from which its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a *habeas corpus*, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on *habeas corpus*, and thus save the party the delay and expense of a writ of error. Bac. Abr. Hab. Cor. B. 13; *Bethel's Case*, Salk. 348; 5 Mod. 19. But the general rule is that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus*. The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

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. . . . . We are clearly of opinion that the question raised in the cases before us is proper for consideration on *habeas corpus*. The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void; and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We

think so, because, if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws.

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PEOPLE EX REL. TWEED V. LISCOMB.

Court of Appeals of New York. June, 1875.
60 N. Y. 559.

Error to the General Term of the Supreme Court in the first judicial department, to review judgment affirming upon *certiorari* an order of the Court of Oyer and Terminer in and for the city and county of New York, dismissing a writ of *habeas corpus* issued upon the application of the relator, and remanding him to custody. Reported below, 3 Hun. 760; 6 N. Y. S. C. (T. & C.) 258.

It appeared by the papers that the relator, William M. Tweed, was confined in the New York penitentiary on Blackwell's Island, of which the defendant was warden. At a court of Oyer and Terminer, held in and for the city and county of New York, the relator was tried upon an indictment containing 220 separate and distinct counts, each charging a misdemeanor, to wit, a neglect of duty as one of the board of auditors of claims against the county of New York. He was found guilty upon 204 of the counts.

Upon twelve of the counts the court sentenced him to twelve successive terms of imprisonment of one year each, and to fines of $250 each; upon other counts to additional fines, amounting in all to $12,500.

The maximum punishment fixed by the statute under which he was indicted (2 R. S. p. 696, § 38; p. 697, § 40) is one year's imprisonment and a fine of $250. By virtue of a commitment issued upon said judgment, the relator was confined in said penitentiary, as aforesaid, and having been there imprisoned for one year, and having paid one fine of $250, he made application for a writ of *habeas corpus* to inquire into the legality of the continued imprisonment.

ALLEN, J. The question of gravest import, and which is to be considered *in limine*, as that upon which the jurisdiction of the court to consider the other question presented depends, relates to the office

and effect of the writ of *habeas corpus,* under our system of jurisprudence, and the statutes of the State regulating proceedings under it. Relief from illegal imprisonment by means of this remedial writ is not the creature of any statute. The history of the writ is lost in antiquity. It was in use before *magna charta,* and came to us as a part of our inheritance from the mother country, and exists as a part of the common law of the state. It is intended and well adapted to effect the great object secured in England by *magna charta,* and made a part of our constitution, that no person shall be deprived of his liberty "without due process of law." Const., art. 1, § 6.

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The Revised Statutes regulate the exercise of this jurisdiction, as well by courts as magistrates, embracing not only cases in vacation, but in term time. 2 R. S. 563; 5 id. (Edm. ed.) 511, revisers' notes. This writ cannot be abrogated or its efficiency curtailed, by legislative action. Cases within the relief afforded by it at common law cannot, until the people voluntarily surrender the right to this, the greatest of all writs, by an amendment of the organic law, be placed beyond its reach and remedial action. The privileges of the writ cannot be even temporarily suspended, except for the safety of the state, in cases of rebellion or invasion. Const., art. 1, § 4.

The remedy against illegal imprisonment afforded by this writ, as it was known and used at common law, is placed beyond the pale of legislative discretion, except that it may be suspended when public safety requires, in either of the two emergencies named in the constitution. This provision of the constitution is a transcript of the former constitution of the state, and it cannot be contended that the framers of the Revised Statutes, by which the practice of the courts in term time was placed under the same regulations as that which had from the first been prescribed for the officers upon whom power had been conferred from time to time by statute, designed to interfere with the principles governing the exercise of the jurisdiction, or lessen the value, the efficiency or importance of the writ itself, which, in respect of the jurisdiction of the Supreme Court and Court of Chancery, was beyond the reach of legislation.

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Persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree, are expressly excluded from the benefit of the act. 2 R. S. 563,

§ 22. And if, upon the return of the writ, it appears that the party is detained in custody by virtue of such judgment or decree, or any execution issued thereon, he must be remanded. Id. 567, § 40. Such persons are deprived of their liberty by "due process of law," and are not within the purview of the constitution, or the purposes of the writ. To bar the applicant from a discharge from arrest by virtue of a judgment or decree, or an execution thereon, the court in which the judgment or decree is given must have had jurisdiction to render such judgment. The tribunal must be competent to render the judgment under some circumstances.

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When a prisoner is held under a judgment of a court made without authority of law, the proper tribunal will, upon *habeas corpus*, look into the record so far as to ascertain this fact; and if it be found to be so, will discharge the prisoner. *Ex parte Lange*, 18 Wall. 163. The court say it is no answer to say that the court had jurisdiction of the person of the prisoner, and of the offence, under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such a case. . . . . .

I see no escape from the conclusion that the jurisdiction of the court of Oyer and Terminer to give the judgment or judgments which appear upon the record returned to this court, and by virtue of which the relator is held, was a proper subject of inquiry upon the return of the writ of *habeas corpus*. It was the only fact which the prisoner could allege, for, whatever errors the court may have committed prior to the judgment, if the court had power to make the judgment, they can only be reviewed by a writ of error. In other words, upon the writ of *habeas corpus*, the court could not go behind the judgment, but upon the whole record, the question was whether the judgment was warranted by law, and within the jurisdiction of the court.

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The indictment in this case is an anomaly, and is probably without precedent, but it may have been justified by the peculiar circumstances of the case. But if a statute was necessary in England to the joinder of three or four offences in one indictment in several counts, and to proceed thereon in respect to any or all of them, it can hardly be claimed that the common law allows 200 separate offences to be charged, and a trial and conviction and separate punishments for fifty distinct offences. No precedent has been found for the practice. The justification is to be found, probably, in the

fact that great wrongs had been perpetrated, and the punishment as for a single misdemeanor was deemed entirely inadequate to the offence, and the public mind was greatly excited, and called for what would be called an approximate vindication of the law, and a somewhat appropriate punishment for the offender. I would not be thought to differ with the trial court in respect to the character of the offence, or of the inadequacy of the statutory punishment upon a single conviction. The remedy was by several indictments, if the offences were distinct. But the courts can only administer the laws as they find them, and it is far better that the most guilty should escape, than that the law should be judicially disregarded or violated. A greater public wrong would be committed, one more lasting in its injurious effects, and dangerous to civil liberty and the sacredness of the law, by punishing a man against and without law, but under color of law and a judicial proceeding, than can result from the escape of the greatest offender, or the commission of the highest individual crimes against law.

Neither the cause of justice or of true reform can be advanced by illegal and void acts, or doubtful experiments by courts of justice, in any form, or to any extent. From some expressions of judges, and the remarks of text-writers, there was some color for the idea that several distinct offences could be tried at the same time. But there was no real or true warrant in this state for several and distinct judgments upon a single indictment in the law, and for that reason the prisoner should have been discharged upon the expiration of the imprisonment for one year and the payment of a fine of $250.

The judgment and orders of the Supreme Court and of the Oyer and Terminer must be reversed, and the prisoner discharged.

See, also, In the Matter of Ah You, 88 Cal. 99, *supra*, where the petitioner was on *habeas corpus* released because the term of imprisonment imposed was longer than was by law proper; and Longenberg v. Decker, 131 Ind. 471, and Ex parte Lehman, 60 Miss. 967, *supra*, where petitioners were released from imprisonment for contempt because the orders committing them for contempt were in excess of the jurisdiction of the authorities making them.

IV. Committing Magistrates.

IN RE ROBERT M. MARTIN.

Circuit Court of the United States. February, 1866.
5 Blatch. (C. C. R.) 303.

This was a writ of *habeas corpus* directed to the Marshal of the Southern District of New York, commanding him to bring the body of Robert M. Martin before the court. As the petition for the writ alleged that the prisoner was detained in custody under a warrant of commitment issued by a United States Commissioner, a writ of *certiorari,* also, was issued by the court to the commissioner, directing him to send up the proceedings and evidence upon which such commitment was founded.

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Shipman, J. The power of this court to grant the writ of *habeas corpus* is not denied, and, therefore, need not now be dwelt upon. Neither shall I discuss at much length its power to grant the writ of *certiorari,* as ancillary to the former writ. The courts of the United States being courts of limited, though not of inferior jurisdiction, their powers must be sought for in the acts of Congress. The 14th section of the Judiciary Act, of September 24th, 1789 (1 *U. S. Stat. at Large* 81), provides, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus,* for the purpose of an inquiry into the cause of commitment. *Provided,* that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." Under the authority conferred by this act, the writ of *habeas corpus* has been repeatedly granted by the courts of the United States, and by the judges thereof. And, although the power to issue the writ of *certiorari* is not conferred by name, it is no doubt included under the general term, "all other

writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Accordingly, the Supreme Court of the United States in *Ex parte Burford,* 3 Cranch 448, and in the case of *Ex parte Bollman,* 4 Cranch 75, issued the writ of *certiorari,* as well as that of *habeas corpus.* These precedents would be quite sufficient to warrant this court in the exercise of its power to issue the former writ, for, jurisdiction in cases of *habeas corpus* is conferred upon the Supreme and Circuit Courts by the same words of the act, as well as the power to issue all other writs which may be necessary for the exercise of jurisdiction. The writ of *certiorari* has always been considered, in appropriate cases, as ancillary to that of *habeas corpus,* and has long been used by the courts of England and this country, as a means of rendering their jurisdiction under the latter writ effective. It is said in Bacon's Abridgement, (Hab. Cor. B. 3): "As the *certiorari* alone removes not the body, so the *habeas corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment; and, therefore, although, upon the *habeas corpus,* and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or discharge or remand the prisoner, as the case appears upon the return, yet they cannot, upon the bare return of the *habeas corpus,* give any judgment, or proceed upon the record of the indictment, order, or judgment, without the record itself be removed by *certiorari.*"

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The next question is—what proceedings of the committing magistrate is the *certiorari* to operate upon and remove into this court? In determining this question, it is proper to notice, in the outset, the functions exercised by the commissioner in committing a prisoner to await the action of the grand jury. In this respect he exercises the powers common to all ordinary committing magistrates. If he finds probable cause to hold the party for trial, he commits him; if not, he discharges him. In neither case is his action final; or a bar to further proceedings. If the prisoner is discharged, he may be again arrested, and, on sufficient evidence, may be committed. If he is committed, he may apply to the court to reduce his bail, or the prosecuting officer may apply to have it increased, or to discharge him altogether. In none of these proceedings of the commissioner are his orders in the nature of a final judgment of a court of record; and it is a common practice for courts, in England and in this country, to which a party is committed for trial, to re-

vise just such orders as the commissioner has made in the present case. This court has repeatedly increased and diminished bail fixed by commissioners, and its authority has never been questioned. Now, in order that this court may exercise intelligently its undoubted authority over such matters, it must be able to go behind the mere formal order of commitment. In order to fix the amount of bail, it must be possessed of sufficient evidence as to what are the peculiarities of the offence committed—whether it is a merely technical breach of law, or one attended by circumstances of peculiar aggravation or atrocity.

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The importance of this power of the court, to look into the evidence as far as may be necessary, in order to decide whether it is proper or not to hold a prisoner in confinement, will be clearly seen on examining the condition of things if no such power existed. One of two results would follow. Either the prisoner would be kept in confinement just as long as the prosecution might see fit to hold him, or the court would be compelled to make a mere arbitrary order limiting the time within which he should be indicted or discharged. It often happens that prisoners are brought into a district for trial, long before the necessary evidence can be obtained for submission to the grand jury. This happens more frequently in the case of crimes committed on shipboard, in remote parts of the world; but it may and does occur in other instances. In such cases, the court would not, unless compelled to do so, arbitrarily limit the time within which an indictment should be found or the prisoner be released. It would be all-important that the court should look into the evidence upon which the prisoner was committed, that it might determine whether or not the circumstances surrounding the commission of the alleged crime were such as to warrant his further detention in the absence of an indictment. The extent of a justifiable delay would be different in different cases, depending upon the evidence. To put an order upon the District Attorney, that he should have his indictment in court by a given day, or that the prisoner be discharged, without looking into the evidence, would be a blind exercise of power, little meriting the term judicial. This the court would be compelled to do, unless it had control over, and the power to examine into, the evidence, or else leave the prisoner virtually in the hands of the prosecutor and to such term of confinement as he might think proper.

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There is another important consideration which it is proper to

advert to. As this court has the power to issue writs of *habeas corpus*, for the purpose of inquiring into the cause of commitment (1 *U. S. Stat. at Large*, 81, § 14; *Ex parte Watkins*, 3 Peters, 193, 201), it would be compelled in the exercise of this power, where the warrant of commitment was irregular and void on its face, to discharge from arrest, unless it could go behind the warrant and examine into the evidence upon which it was founded. This, as I have already shown, would sometimes be impracticable, unless the court could resort to the evidence upon which the commissioner acted, and which might be within reach of the court, on the return to the *habeas corpus*, only through the commissioner's minutes or his own testimony. For these reasons, the commissioner who committed the prisoner in this case must answer the *certiorari*, by producing the evidence taken before him. As this evidence was, I suppose, substantially reduced to writing by him on the hearing, it will be sufficient to produce his minutes thereof, and the affidavit upon which the original warrant of arrest was issued. The warrant itself and the order of commitment are already before the court.

To avoid all misconception, it may be well to remark, that the principles here laid down, have no necessary relation to the powers conferred upon commissioners under the laws touching the execution of extradition treaties.

The return to the *certiorari* having been made in conformity to the above decision, and the question of the further detention or discharge of the prisoner having been heard, the court proceeded to render the following decision:

SHIPMAN, J. The evidence and proceedings upon which the prisoner, Robert H. Martin, was committed to await the action of the grand jury in this court, have been carefully examined and considered by the court. The question now to be determined is, whether he shall be remanded or discharged.

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It follows, from these views, that there was no sufficient evidence to warrant the commitment of the prisoner for trial in this district. He must, therefore, be discharged from custody under this warrant or order of commitment, and a proper order will be entered to that effect.

After indictment the habeas corpus court will not examine into the guilt or innocence of the prisoner. People v. Rulloff, 18 How. Pr. (N. Y.) 93.

V. Courts Having Jurisdiction.

EX PARTE BARRY.

Supreme Court of the United States. January, 1844.
2 How. (U. S.) 65.

Mr. Justice Story delivered the opinion of the court.

This is a petition filed in this court for a writ of *habeas corpus* to be awarded to bring up the body of the infant daughter of the petitioner, alleged to be now unlawfully debarred from him, and in the custody of Mrs. Mary Mercein, the grandmother of the said child, in the district of New York. The petitioner is a subject of the queen of Great Britain; and the application in effect seeks the exercise of original jurisdiction in the matter upon which it is founded. No application has been made to the Circuit Court of the United States for the district of New York, for relief in the premises, either by writ of *habeas corpus* or *de homine replegiando*, or otherwise; and, of course, no case is presented for the exercise of the appellate jurisdiction of this court by any review of the final decision and award of the Circuit Court upon any such proceedings. Nor is any case presented for the exercise of the appellate jurisdiction of this court upon a writ of error to the decision of the highest court of law and equity in the state of New York, upon the ground of any question arising under the 25th section of the Judiciary act of 1789, ch. 20.

The case, then, is one avowedly and nakedly for the exercise of original jurisdiction by this court. Now the Constitution of the United States has not confided any original jurisdiction to this court, except "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party." The present case falls not within either predicament. It is the case of a private individual who is an alien seeking redress for a supposed wrong done him by another private individual, who is a citizen of New York. It is plain, therefore, that this court has no original jurisdiction to entertain the present petition; and we cannot issue any writ of *habeas corpus*, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the Constitution or laws of the United States. Without, therefore, entering into the merits of the present application, we are compelled by our duty, to dismiss the petition, leaving the petitioner to seek redress in such other tribunal of the United States as may be en-

titled to grant it. If the petitioner has any title to redress in those tribunals, the vacancy in the office of the judge of this court assigned to that circuit and district creates no legal obstruction to the pursuit thereof.

But a court possessing appellate jurisdiction only will issue the habeas corpus to relieve one from imprisonment, who is confined under a judgment of a court which is alleged to be in excess of its jurisdiction, because e. g. a conviction is had under an unconstitutional law. Ex parte Siebold, 100 U. S. 371, *supra*.

IN RE NEAGLE.

Supreme Court of the United States. October, 1889.
135 U. S. 1.

Mr. Justice MILLER, after stating the case, ... delivered the opinion of the court.

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The enactments now found in the Revised Statutes of the United States on the subject of the writ of *habeas corpus* are the result of a long course of legislation forced upon Congress by the attempts of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the states denied. The original act of Congress on the subject of the writ of *habeas corpus*, by its 14th section, authorized the judges and courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. 1 Stat. 81, c. 20, § 14. This did not present the question, or, at least, it gave rise to no question which came before the courts, as to releasing by this writ parties held in custody under the laws of the states. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the state authorities, it became necessary for the Con-

gress of the United States to take some action for their relief. Accordingly the act of Congress of March 2, 1833, 4 Stat. 634, c. 57, § 7, among other remedies for such condition of affairs, provided by the 7th section, that the federal judges should grant writs of *habeas corpus* in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of *habeas corpus* might issue by the federal judges arose out of the celebrated *McLeod Case*, in which McLeod, charged with murder in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the State of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the State of New York. This led to an extension of the powers of the federal judges under the writ of *habeas corpus*, by the act of Aug. 29, 1842, 5 Stat. 539, c. 257, entitled "An act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of *habeas corpus* in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill which afterwards became a law, on this subject, Senator Berrien, who introduced it into the Senate, observed: "The object was to allow a foreigner, prosecuted in one of the States of the Union for an offence committed in that State, but which he pleads has been committed under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations, and showing this, the writ of *habeas corpus* is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the proceedings of the State jurisdiction on the preliminary issue of his

plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief." No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of *habeas corpus* was the act of February 5, 1867, 14 Stat, 385, c. 28, and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that "the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."

. . . . . .

See also Boske v. Comingore, 177 U. S. 459, and Yick Wo v. Hopkins, 118 U. S. 356, for examples of the release by a United States court of one held under state authority.

ABLEMAN V. BOOTH.

UNITED STATES V. BOOTH.

Supreme Court of the United States. December, 1858.
21 How. (U. S.) 506.

These two cases were brought up from the Supreme Court of the State of Wisconsin by a writ of error issued under the 25th section of the judiciary act.

The facts are stated in the opinion of the court.

Mr. Chief Justice TANEY delivered the opinion of the court.

The plaintiff in error in the first of these cases is the marshal of the United States for the district of Wisconsin, and the two cases have arisen out of the same transaction, and depend, to some extent, upon the same principles. On that account, they have been argued and considered together.

. . . . . .

It will be seen from the . . . . . statement of facts that a Judge of the Supreme Court of the state of Wisconsin in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner for an offence against the laws of this government, and that this exercise or power by the judge was afterwards sanctioned and affirmed by the Supreme Court of the State.

In the second case, the state court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a District Court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*, has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment by the District Court.

And it further appears that the state courts have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the state court.

These propositions are new in the jurisprudence of the United States, as well as of the States, and the supremacy of the state courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State.

. . . . . .

We do not question the authority of a State court, or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding for what cause and by what authority the prisoner is confined within the territorial limits of the state's sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows, necessarily, out of the complex character of our government, and the existence of

two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a *habeas corpus* issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

. . . . . .

We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the State; and when a court so elevated in its position has pronounced a judgment which, if it could be

maintained, would subvert the very foundations of this government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the state court has fallen, and the consequences to which they would inevitably lead.

But it can hardly be necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any defect of power in the commissioner, or in his mode of proceeding, it was for the tribunals of the United States to revise and correct it, and not for a state court. And as regards the decision of the District Court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a State or the United States, by *habeas corpus* or any other process.

. . . . . .

The judgment of the Supreme Court of Wisconsin must therefore be reversed in each of the cases now before the court.

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